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## Policing the Wombs of the World's Women: The Mexico City Policy

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# Policing the Wombs of the World's Women: The Mexico City Policy

SAMANTHA LALISAN\*

*We refuse to sign a law that is anti-democratic, a law that undermines national sovereignty, limits the right of free speech and the ability of our providers to provide the best care to all . . . . [W]e refuse to sign a law that plays with women's lives . . . .*<sup>1</sup>

## INTRODUCTION

Historically, the United States has used foreign aid to facilitate stability abroad, encourage change in other governments, and export democratic ideals.<sup>2</sup> Indeed, a central attraction of foreign aid is the power it gives policymakers over other governments. The U.S. government generally has conditioned its foreign aid in order to further its own policy goals.<sup>3</sup> Foreign aid has been described as “perhaps the best tool that exists, to get other governments, especially poor and weak ones, to act in the ‘right way.’”<sup>4</sup> However, the use of foreign aid as foreign policy can raise serious policy concerns and run counter to core constitutional values, which is especially problematic when restrictions on aid undermine democratic processes abroad.<sup>5</sup>

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\* J.D. 2019, Indiana University Maurer School of Law; B.A. 2016, University of California, Los Angeles. I would like to thank the editors of the *Indiana Law Journal* for their help in getting this Comment ready for publication. I would especially like thank Professor Dawn Johnsen for her guidance and helpful feedback.

1. TAYLOR LEWIS, UNITED STATES FOREIGN POLICY HARMS WOMEN'S REPRODUCTIVE RIGHTS AROUND THE WORLD: THE IMPACT ON LATIN AMERICA, COUNCIL ON HEMISPHERIC AFFAIRS 1 (2017) (citation omitted) (internal quotation mark omitted), <http://www.coha.org/wp-content/uploads/2017/03/United-States-Foreign-Policy-Harms-Women's-Reproductive-Rights-Around-the-World-The-Impact-on-Latin-America-PDF-.pdf> [<https://perma.cc/LY3W-M3ZN>].

2. *See generally* JEFFREY F. TAFFET, FOREIGN AID AS FOREIGN POLICY: THE ALLIANCE FOR PROGRESS IN LATIN AMERICA 1–4 (2007); *see also* Nina J. Crimm, *The Global Gag Rule: Undermining National Interests by Doing unto Foreign Women and NGOs What Cannot Be Done at Home*, 40 CORNELL INT'L L.J. 587, 588 (2007) (“[E]lected politicians intentionally have inculcated foreign policy and foreign assistance policy with their own religious moral values.”).

3. *See generally* TERESA HAYTER, AID AS IMPERIALISM 15 (1971) (stating that U.S. foreign aid “has never been an unconditional transfer of financial resources” and the impact of such aid on developing countries).

4. TAFFET, *supra* note 2, at 4.

5. *See, e.g.*, Rachel E. Seevers, *The Politics of Gagging: The Effects of the Global Gag Rule on Democratic Participation and Political Advocacy in Peru*, 31 BROOK. J. INT'L 899, 899–900 (2006) (“The restrictions of the U.S. policy prevent advocacy and civil participation by these recipient NGOs, and infringe on their right to free speech and their ability to speak out in a national democratic dialogue.”); Priscilla Smith, Kathy Hall Martinez & Tzili Mor, *The Global Gag Rule: A Violation of the Right to Free Speech and Democratic Participation*, AM. BAR ASS'N (July 1, 2002), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/human\\_rights\\_vol29\\_2002/summer2002/irr\\_hr\\_summer02\\_smith/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol29_2002/summer2002/irr_hr_summer02_smith/)

The Mexico City Policy (“the Policy” or “Global Gag Rule”) is emblematic of this problem. The Policy was first announced by President Regan’s administration at the International Conference on Population in 1984<sup>6</sup> and since then has been routinely rescinded and reinstated along party lines by subsequent presidential administrations. Generally, the Policy requires foreign nongovernmental organizations (FNGOs) to certify that they will not “perform or actively promote abortion as a method of family planning” as a condition of receiving U.S. global health assistance.<sup>7</sup> Importantly, the Policy is known as the “global gag rule” because of the limitations it places on FNGOs. Such organizations are prohibited from using their own funds to provide legal abortion services, prohibited from actively promoting abortion by “[l]obbying a foreign government to legalize or make available abortion as a method of family planning,”<sup>8</sup> and prohibited from “[c]onducting a public information campaign in foreign countries regarding . . . abortion.”<sup>9</sup> These conditions effectively restrict the speech of FNGOs.<sup>10</sup>

The frequent rescission and reinstatement of the Policy has made it into a known “political football” in which Democratic administrations will rescind the Policy and Republican administrations will reinstate it.<sup>11</sup> Typically, each Republican administration maintained the Policy relatively unchanged from that initially instituted by the Reagan administration. However, when President Donald Trump reinstated the Policy one day after his inauguration, he changed this practice by *expanding* the scope of the Policy and thereby created global health concerns for developing countries.<sup>12</sup> This unprecedented expansion, which I will call “Trump’s Global Gag Rule” (“Trump GGR”), is even more egregious than previous Republican administrations because it extends restrictions to an estimated \$8.8 billion in U.S. global health assistance from the previous \$575 million in restricted

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[<https://perma.cc/5G9H-L3K2>] (“The global gag rule erects barriers to the development of the democratic process in other countries, the promotion of civil society and development of FNGOs abroad, and the enhancement of women’s equality and participation in the political process.”).

6. See Susan A. Cohen, *The Mexico City Policy: A ‘Gag Rule’ That Violates Free Speech and Democratic Values*, in THE GUTTMACHER REPORT ON PUBLIC POLICY 1 (1998).

7. USAID, STANDARD PROVISIONS FOR NON-U.S. NONGOVERNMENTAL ORGANIZATIONS: A MANDATORY REFERENCE FOR ADS CHAPTER 303, at 86 (2019).

8. *Id.* at 90, 94.

9. *Id.*; see also *id.* at 86–89 (stating that the Mexico City Policy is formally known as “Protecting Life in Global Health Assistance”).

10. Admittedly, FNGOs are not forced into accepting foreign aid from the U.S. and can refuse U.S. aid if the FNGOs find the conditions reprehensible. However, the current state of foreign aid makes refusing such aid overwhelming impracticable because the funding sometimes constitutes an overwhelming majority of a recipient FNGO’s funding.

11. See *infra* Section I.C.2.

12. Donald J. Trump, *Presidential Memorandum Regarding the Mexico City Policy*, THE WHITE HOUSE (Jan. 23, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-mexico-city-policy/> [<https://perma.cc/2BCT-3692>] (“I direct the Secretary of State, in coordination with the Secretary of Health and Human Services, to the extent allowable by law, to implement a plan to *extend* the requirements of the reinstated Memorandum to global health assistance furnished by all departments or agencies.”) (emphasis added).

funds.<sup>13</sup> The Trump GGR expanded the Policy's application from international family planning to all "global health assistance furnished by all departments or agencies" instead of applying only to the State Department and United States Aid for International Development (USAID).<sup>14</sup>

Not only does the Policy, and now the Trump GGR, play politics with the lives of women around the world, but it undermines democratic values and processes that American foreign policy purportedly seeks to advance around the world. For example, in her statement before the United States Senate Committee on Foreign Relations, Susana Silva Galdos<sup>15</sup> captured the core First Amendment issues regarding the Policy. She said:

I have not been allowed to speak about [abortion] under the global gag rule . . . I will return to my country tomorrow; I will again be silenced. But now, at least for today, I can speak freely here in the United States, not my country . . . We in Peru believe in democracy, as do you, citizens of the United States. But democracy is not only for one country. The global gag rule . . . is against democracy because it makes a distinction between the United States and the rest of the world.<sup>16</sup>

The gagging of Galdos's speech within her own country demonstrates the deeply hypocritical nature of the Policy. If the restrictions imposed on Galdos and FNGOs were imposed on similarly situated American citizens and Non-Governmental Organizations (NGOs), they would constitute an unconstitutional violation of the First Amendment right to free speech.<sup>17</sup> Although there are legitimate (and usually "traditional") reasons for the distinct treatment of aliens and citizens regarding the right of free speech,<sup>18</sup> the treatment demonstrates a significant divergence from

13. *Trump's 'Mexico City Policy' or 'Global Gag Rule,'* HUMAN RIGHTS WATCH (Feb. 14, 2018, 12:55 AM), <https://www.hrw.org/news/2018/02/14/trumps-mexico-city-policy-or-global-gag-rule> [<https://perma.cc/USW4-XKDQ>]; see also Margaret Talbot, *Trump Makes the Global Gag Rule on Abortion Even Worse*, THE NEW YORKER (Jan. 25, 2017), <https://www.newyorker.com/news/daily-comment/trump-makes-the-global-gag-rule-on-abortion-even-worse> [<https://perma.cc/3LKM-63KG>].

14. Sneha Barot, *When Antiabortion Ideology Turns into Foreign Policy: How the Global Gag Rule Erodes Health, Ethics and Democracy*, 20 GUTTMACHER POL'Y REV. 73, 73 (2017).

15. Galdos is a citizen of Peru and President of a foreign nongovernmental organization that receives foreign aid from the United States.

16. *Mexico City Policy: Effects of Restrictions on International Family Planning Funding: Hearing Before the S. Comm. on Foreign Relations*, 170th Cong. 28, 30 (2001) (statement of Susana Silva Galdos, President, Movement Manuela Ramos, Lima Peru) [hereinafter *Hearing Before the S. Comm. on Foreign Relations*].

17. See *USAID v. Alliance for Open Soc'y Int'l Inc.*, 570 U.S. 205, 213 (2013) ("It is, however, a basic First Amendment principle that 'freedom of speech prohibits the government from telling people what they must say.'"); Julia L. Ernst, Laura Katzive & Erica Smock, *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 783 (2004) ("[S]everal members of Congress sent a letter to the Bush administration requesting that the global gag rule be extended to apply to U.S.-based organization, a move that would clearly be unconstitutional . . .").

18. Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and*

firmly held First Amendment values of maintaining a robust market place of ideas,<sup>19</sup> defending the right to engage in expression that may be controversial or disagreeable to society,<sup>20</sup> and maintaining democratic self-governance.<sup>21</sup> Notwithstanding formal limits on the applicability of the First Amendment outside U.S. borders, the very fact that the United States is doing unto foreigners what it cannot do to U.S. citizens is problematic and unjustified. Indeed, “if we truly believe in the basic constitutional right of free speech and association, we should want to promote them worldwide rather than to evade them outside our territorial boundaries.”<sup>22</sup>

Galdos’s statements also highlight the tension between the goals of foreign aid and the Policy’s restrictions on speech. U.S. foreign aid is largely overseen by USAID, whose stated objectives are to “promote and demonstrate democratic values abroad, and advance a free, peaceful, and prosperous world.”<sup>23</sup> However, in order to foster democracy and such values abroad it is necessary to speak, advocate, and lobby government actors.<sup>24</sup> The gag rule fundamentally undermines democratic processes abroad and is in direct contradiction with the stated goals of USAID.

This Comment argues that the Policy should be repealed because it undermines firmly held First Amendment values and would be considered unconstitutional if applied to domestic nongovernmental organizations (DNGOs). It proceeds in four parts. Part I describes the inception of the Policy and contextualizes it among other antiabortion policies that resulted as a backlash to the U.S. Supreme Court’s landmark decision in *Roe v. Wade*. Part II explains the Policy’s actual effect on FNGOs, particularly focusing on organizations based in Nepal and Peru, and argues that the Policy undermines democratic processes abroad and fails to achieve its stated objective: reducing the number of abortions. Part III examines current First Amendment doctrine on unconstitutional conditions and free speech and acknowledges standing issues regarding FNGOs. It argues that the Policy should be considered a violation of protected First Amendment speech because if it were

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*Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1544 (2010) (“Traditional First Amendment theories or justifications have generally assumed that the First Amendment is a wholly domestic concern, one generally impervious to events, laws, or persons outside U.S. borders.”).

19. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.”).

20. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 15 (1948).

21. Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011) (“[T]he best possible explanation for the shape of the First Amendment doctrine is the value of democratic governance.”).

22. Crimm, *supra* note 2, at 592; see also Cohen, *supra* note 6, at 1 (“Promoting democracy is an explicit U.S. foreign policy objective reflecting core American values such as free speech, access to the political process and the right, in the words of the United States Constitution itself, ‘to petition the government for a redress of grievances.’”).

23. *Mission, Vision and Values*, USAID, <https://www.usaid.gov/who-we-are/mission-vision-values> [<https://perma.cc/62YF-ZW65>].

24. Brief of International Law Scholars et al. as Amici Curiae Supporting Petitioner at 3, *Center for Reprod. Law & Policy v. Bush*, 304 F.3d 183 (2001) (No. 01-6168).

applied to DNGOs it would be considered unconstitutional. In Part IV the Comment considers foundational First Amendment values (the marketplace of ideas, individual autonomy, and democratic self-governance) and argues that the Policy should be repealed, or at the very least revised, because it undermines and contradicts each of these values.<sup>25</sup>

#### I. *ROE V. WADE* BACKLASH: DEVELOPMENT OF THE GLOBAL GAG RULE

The Mexico City Policy is by no means an isolated instance of abortion restriction, and it should be considered in tandem with other domestic and foreign policies established after the U.S. Supreme Court's landmark decision in *Roe v. Wade*.<sup>26</sup> This is most clearly seen in the Helms Amendment to the Foreign Assistance Act and the Hyde Amendment. The Policy, and now Trump's GGR, is also part of this greater effort to restrict women's constitutional right to obtain an abortion and part of a conservative backlash against *Roe*. However, it has far surpassed previous legislation that restricted the use of U.S. funds for abortion-related purposes.

##### A. *The Helms Amendment to the Foreign Assistance Act*

In 1961, President John F. Kennedy signed the Foreign Assistance Act (FAA) which authorized him to

furnish assistance, on such terms and conditions as he may determine, for voluntary population planning. In addition to the provision of family planning information and services, including also information and services which relate to and support natural family planning methods . . . population planning programs shall emphasize motivation for small families.<sup>27</sup>

The primary purported purpose of the FAA was to aid under-developed countries in making progress. On signing the FAA, President Kennedy stated that “[t]he long-term commitment of development funds, which the bill authorizes, will assist the under-developed countries of the world to take the critical steps essential to economic and social progress.”<sup>28</sup> The underlying justification for the FAA was the development and maintenance of democracy in the developing world with an understanding that providing aid to other countries ensured security and peace for the United States. For instance, President Johnson, in a statement to Congress regarding foreign aid, stated: “The incessant cycle of hunger, ignorance, and disease is the common blight of the

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25. Some scholars have argued that the Policy violates international law. See, e.g., Michele Goodwin, *Challenging the Rhetorical Gag and Trap: Reproductive Capacities, Rights, and the Helms Amendment*, 12 NW. U. L. REV. 1417, 1429 (2018); Julia Hahn, *The Detrimental Effects of President Donald Trump's Executive Order Restricting Access to Healthcare in Foreign Countries*, 18 RUTGERS J.L. & RELIGION 418, 424 (2017).

26. 410 U.S. 113 (1973).

27. 22 U.S.C. § 2151b(b) (2016).

28. Statement by the President Upon Signing the Foreign Assistance Act, 1 PUB. PAPERS 588 (Sept. 4, 1961).

developing world. This vicious pattern can be broken. It must be broken if democracy is to survive.”<sup>29</sup> With regard to family planning and population growth, President Johnson was clear that such policies are a “question for each family and each nation to decide.”<sup>30</sup>

However, this notion of allowing individual families and countries to decide family and population-planning policies was clearly not followed. In 1973, the year *Roe* was decided, Congress passed the Helms Amendment to the FAA which prohibits the use of U.S. foreign aid for abortion services.<sup>31</sup> Specifically, the Amendment states: “None of the funds . . . may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.”<sup>32</sup> When proposing this Amendment, former Senator Jesse Helms of North Carolina, a strident antiabortionist, said, “[u]nless Congress does so now, we will soon see the day when abortifacient drugs and techniques dominate AID’s program, and the United States becomes the world’s largest exporter of death.”<sup>33</sup>

The Helms Amendment was met with significant pushback because domestic and foreign experts considered safe-abortion services a fundamental aspect of reproductive health care and family planning. For instance, under President Nixon, USAID strongly opposed the Amendment and wrote that the Agency

explicitly acknowledges that every nation should be free to determine its own policies and procedures with respect to population growth and family planning. In contradiction of this principle, the Amendment would place U.S. restrictions on both developing country governments and individuals in the matter of free choice among the means of fertility control . . . that are legal in the U.S.<sup>34</sup>

Indeed, the timing of the Helms Amendment with the recent *Roe* decision made the hypocrisy even more apparent. Effectively, through the Amendment, the United States would not provide women in other countries the same reproductive health care options—the right to obtain an abortion—that it gave American women that same year, except in cases to save the woman’s life, rape, or incest.

When promoting his Amendment, Helms knew that it would not make foreign governments and other organizations that have been promoting abortion “suddenly stop when they are not allowed to use U.S. Government funds for that purpose.”<sup>35</sup> Accordingly, the Amendment provides flexibility in this regard by requiring that, specifically, U.S. funds not be used for abortion purposes, while private funds may be used for abortion purposes.<sup>36</sup> Indeed, Helms even stated that Congress could “go

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29. Special Message to the Congress on the Foreign Aid Program, 1 PUB. PAPERS 117, 118 (Feb. 1, 1966).

30. *Id.* at 120.

31. See Jessica Boyer, *What Congress Can Do to Restore U.S. Leadership on Global Sexual and Reproductive Health and Rights*, 21 GUTTMACHER POL’Y REV. 55, 58 (2018).

32. 22 U.S.C. § 2151b(f)(1) (2016).

33. 119 CONG. REC. 32292, 32294 (1973).

34. Rosoff JI, Senate-House Conferees Consider Helms Amendment, Planned Parenthood-World Population Washington Memo 1–2 (1973).

35. 119 CONG. REC. 32292, 32294 (1973).

36. Yvette Aguilar, *Gagging on a Bad Rule: The Mexico City Policy and its Effect on*

far beyond the present amendment and require all abortion activities, from whatever funds, to be stopped before our assistance could be received. But the present amendment does not do that . . . it is certainly permissible to require each recipient to agree not to use our money for killing the unborn.”<sup>37</sup>

Despite this flexibility, the Amendment was a fundamental shift from soft law practices of using aid to advance rule of law initiatives, promote democracy, and create stability abroad.<sup>38</sup> Instead, the Amendment deliberately plays with the needs of countries desperate to relieve poverty and coerces them into accepting reforms demanded by “the host country.”<sup>39</sup> That is, Helms knew that by attaching policies he deemed morally acceptable—abolishing abortion—to aid that receiving countries needed, he could advance a specific policy that he could actually not advance domestically. Although the Amendment has restricted the use of U.S. aid for abortive practices for decades, the Policy, and now the Trump GGR, have gone far beyond the Amendment and are inconsistent with the Helms Amendment to the FAA.

### B. The Hyde Amendment

The successful passage of the Helms Amendment in 1973 provided groundwork for a very similar domestic bill in 1977—the Hyde Amendment. When introducing his bill, Representative Henry Hyde stated during a floor debate: “I certainly would like to prevent, if I could legally, anybody having an abortion, a rich woman, a middle-class woman, or a poor woman. Unfortunately, the only vehicle is the . . . Medicaid bill. A life is a life.”<sup>40</sup> Like the Helms Amendment, the Hyde Amendment was a response to the Supreme Court’s ruling in *Roe* and sought to restrict a woman’s right to an abortion by placing a burden on those who relied on health care through Medicaid.<sup>41</sup> Specifically, the Amendment states that “[n]one of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.”<sup>42</sup> The Amendment has also been used as a model for analogous restrictions for those who are insured, not through Medicaid, but other government programs.<sup>43</sup> However, seventeen states do have policies that allow the use of state funds to provide abortions for low-income women using Medicaid.<sup>44</sup>

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*Women in Developing Countries*, 5 SCHOLAR 37, 43 (2002).

37. 119 CONG. REC. 32292, 32293 (1973).

38. TAFFET, *supra* note 2, at 3.

39. 119 CONG. REC. 32292, 32293.

40. 123 CONG. REC. 19693, 19700 (1977).

41. Nicole Huberfeld, *Conditional Spending and Compulsory Maternity*, 2010 U. ILL. L. REV. 751, 754 (2010).

42. Pub. L. No. 94-439, 90 Stat. 1434, (Sept. 30, 1976).

43. Megan K. Donovan, *In Real Life: Federal Restrictions on Abortion Coverage and the Women They Impact*, 20 GUTTMACHER POL’Y REV. 1, 1 (2017).

44. Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 GUTTMACHER POL’Y REV. 46, 48 (2016). The Hyde Amendment, notoriously, impacts women of color and low-income women. See *Harris v. McRae*, 448 U.S. 297, 332 (1980) (Brennan, J., dissenting) (“Worse yet, the Hyde Amendment does not foist that majoritarian viewpoint with equal measure upon everyone in our Nation,

The Hyde Amendment was upheld in *Harris v. McRae* when the closely divided Supreme Court found that even though *Roe* establishes a woman's right to obtain an abortion, "it does not follow that a woman's freedom to choose carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices . . . [T]he Hyde Amendment leaves an indigent woman with at least the same range of choice[s]" when deciding to obtain an abortion.<sup>45</sup> The Court relied on *Maher v. Roe* when it held that while the state and federal government cannot place obstacles in a woman's decision regarding abortion, the government "need not remove obstacles not of its own creation."<sup>46</sup> This means that if a woman cannot afford an abortion, she has no positive right to assert a right to a paid abortion by the government, and her own refusal to pay for an abortion is an individual problem.<sup>47</sup>

In dissent, Justice Brennan recognized the legislature's attempt to circumvent the Court's decision in *Roe* by undermining a woman's right to an abortion through funding requirements. Justice Brennan correctly notes that the Hyde Amendment's "denial of public funds for medically necessary abortions plainly intrudes upon" the decision in *Roe* because it "coerce[s] indigent pregnant women to bear children that they would otherwise elect not to have."<sup>48</sup> Indeed, the "Hyde Amendment is nothing less than an attempt by Congress to circumvent the dictates of the Constitution and achieve indirectly what *Roe v. Wade* said it could not do directly."<sup>49</sup>

The Helms Amendment of 1973 and the Hyde Amendment ("the Amendments") are, undoubtedly, part of a larger antiabortion movement that was fueled by the Court's decision in *Roe*. Both Amendments have circumvented the essential holding of *Roe* by attaching restrictions on funding. For instance, the Amendments require that federal government funds not be used to provide abortion. In the case of the Helms Amendment, U.S. foreign aid cannot be used to provide women in foreign countries with abortions<sup>50</sup> and, under the Hyde Amendment, federal government funds through healthcare programs such as Medicaid cannot be used to fund abortions.<sup>51</sup> Ironically, proponents of other policies that restrict government funding for abortion services, such as the Policy, argue that such additional policies are necessary to keep government funding from supporting abortion even though they know that U.S. funds have not supported abortion, domestically or abroad, since the

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rich and poor alike, rather, it imposes that viewpoint only upon that segment of our society which, because of its position of political powerlessness, is least able to defend its privacy rights from the encroachments of state mandated morality." See generally Rebecca A. Hart, *No Exceptions Made: Sexual Assault Against Native American Women and the Denial of Reproductive Healthcare Services*, 25 WIS. J.L. GENDER & SOC'Y 209 (2010); Brooke McGee, *Assault Victims: An Analysis of South Dakota's Denial of Medicaid-Funded Abortion for Rape and Incest Victims and Why the Hyde Amendment Must Be Repealed*, 27 GEO. MASON U. CIV. RTS. L.J. 77 (2016).

45. 448 U.S. 297, 298 (1980).

46. *Id.* at 316; see also Huberfeld, *supra* note 41, at 754.

47. Huberfeld, *supra* note 41, at 754.

48. *McRae*, 448 U.S. at 330 (Brennan, J., dissenting).

49. *Id.* at 331.

50. Boyer, *supra* note 31, at 58.

51. Pub. L. No. 94-439, 90 Stat. 1434 (Sept. 30, 1976).

passage of the Helms and Hyde Amendments.<sup>52</sup> This push for the Policy, despite the existence of these Amendments, signals that the Policy may actually be meant to do more than simply keep abortions unfunded by the government.<sup>53</sup> Indeed, on almost all fronts, the Policy and Trump's GGR far surpass the objectives of the Helms and Hyde Amendments.

### C. The Mexico City Policy

The U.S. delegation, led by former Senator James L. Buckley,<sup>54</sup> who was appointed chairman by President Regan, first announced the Policy at the 1984 United Nations International Conference on Population in Mexico City:

[T]he United States does not consider abortion an acceptable element of family planning programs and will no longer contribute to those of which it is a part. Accordingly, when dealing with nations which support abortion with funds not provided by the United States Government, the United States will contribute to such nations through segregated accounts which cannot be used for abortion. Moreover, the United States will no longer contribute to separate nongovernmental organizations which perform or actively promote abortion as a method of family planning in other nations.<sup>55</sup>

The following explores the challenges to the Policy, the frequent rescission and reinstatement of the Policy along party lines, and President Trump's expansion of the Policy.

#### 1. Early Challenges

After the Reagan Administration announced the Policy, there was an immediate backlash and lawsuits were filed challenging it. The first challenge was in *Alan Guttmacher Institute v. Agency for International Aid*.<sup>56</sup> The complaint was filed in

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52. See Barot, *supra* note 14.

53. See, e.g., Seevers, *supra* note 5, at 907–08 (“The Gag Rule went even further than the Helms Amendment and prohibited family planning centers and health care advocates from using their own, non-U.S. money to discuss the impact of abortions, educate women on the availability of abortions, or advocate to their own governments for changes in restrictive abortion laws.”).

54. Senator Buckley was an ardent opponent of the Court's ruling in *Roe v. Wade*. The former Senator sponsored several unsuccessful constitutional amendments to ban abortion outright. Indeed, he suggested several times that his antiabortion stance and actions were necessary because of “the ethical tradition of more than 2,000 years of Western civilization . . . .” JAMES L. BUCKLEY, IF MEN WERE ANGELS: A VIEW FROM THE SENATE 52 (1975).

55. The White House Office of Policy and Development, *US Policy Statement for the International Conference on Population*, 10 POPULATION & DEV. REV. 574, 578 (1984); see also, *The Mexico City Policy: An Explainer*, KFF: GLOBAL HEALTH POL'Y (Aug. 15, 2018), <https://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer/#footnote-257134-1> [hereinafter KFF Explainer].

56. 616 F. Supp. 195 (S.D.N.Y. 1985).

response to USAID's denial of funding for one of the Guttmacher Institute's publications, *International Family Planning Perspectives*, because it tended to promote abortion.<sup>57</sup> Although the initial complaint did not include a cause of action against the Policy, the plaintiff, a DNGO, later sought to amend its complaint to challenge it.<sup>58</sup> The court ultimately denied the plaintiff's motion to amend the complaint because there were "no issues which are yet ripe for judicial decision."<sup>59</sup>

The Policy was again challenged on constitutional grounds in *DKT Memorial Fund Ltd. v. Agency for International Development*, filed by FNGOs and DNGOs against the U.S. government to fund groups that engaged in abortion-related practices.<sup>60</sup> The plaintiffs argued a statutory and a constitutional claim. First, they argued that the Policy runs afoul of the FAA and contravenes congressional limits and intent.<sup>61</sup> The plaintiffs argued that the Policy violates the FAA because it goes further than the statutory limits.<sup>62</sup> They specifically referred to Senator Helms's statement before Congress that they "could . . . go far beyond the present amendment and require all abortion activities, from whatever funds, to be stopped before our assistance could be received."<sup>63</sup> The plaintiffs then argued that it follows that Congress thought about expanding the FAA but rejected it.<sup>64</sup> However, the court found that "[t]his [was] simply not the case"<sup>65</sup> and that a senator's statement does not mean that "Congress 'has spoken' on the issue of whether limitations may be imposed on the use of non-federal funds."<sup>66</sup>

Second, the plaintiffs argued that the Policy "violates [their] protected First Amendment rights by rendering plaintiffs ineligible to receive population assistance funds because they engage in certain activities relating to voluntary abortion."<sup>67</sup> The court dismissed the claims of the FNGOs on standing grounds<sup>68</sup> and held that foreign aliens acting outside the United States are not within the "zone of interests to be protected or regulated by the statute of constitutional guarantee in question."<sup>69</sup>

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57. *Id.* at 202.

58. *Id.* at 210.

59. *Id.*; see also Aguilar, *supra* note 36, at 68.

60. 887 F.2d 275 (D.C. Cir. 1989).

61. *Id.* at 279.

62. *Id.*

63. *Id.* at 280.

64. *Id.*

65. *Id.*

66. *Id.* (quoting *Planned Parent Fed'n of America v. Agency for Int'l Dev.*, 838 F.2d 649, 655 (2d Cir. 1988)).

67. *Id.* at 282; see also Roberta J. Sharp, *Holding Abortion Speech Hostage: Conditions on Federal Funding of Private Population Planning Activities*, 59 GEO. WASH. L. REV. 1218, 1225 (1990).

68. Concurring and dissenting in part, then Circuit Judge Ruth Bader Ginsburg argued that it is unnecessary to determine the standing of foreign plaintiffs "[b]ecause AID respect for the first amendment rights of domestic grantees should assure the relief all plaintiffs seek." *DKT*, 887 F.2d at 299 (Ginsburg, J., concurring and dissenting in part); see also Sharp, *supra* note 67, at 1228.

69. *DKT*, 887 F.2d at 283 (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982)); see also Anna Su, *Speech Beyond Borders: Extraterritoriality and the First Amendment*, 67 VAND. L. REV.

The Policy was again challenged in *Planned Parenthood Federation of America, Inc. v. Agency for International Development*.<sup>70</sup> The plaintiffs argued that the Policy violated their constitutional rights to free speech, association, and privacy. Specifically, they argued that the Policy

imposes unconstitutional conditions on an important government benefit by requiring it to enforce restrictions on speech in order to participate as a conduit for AID funds to foreign NGOs[,] [and] interferes with free speech . . . by providing an financial incentive for [FNGOs] to abstain from participating with them in abortion-related activities.<sup>71</sup>

The Second Circuit dismissed the claim and affirmed the district court's decision that the Policy was implemented in "the least restrictive means" and "advance[d] a substantial governmental foreign policy interest."<sup>72</sup>

The last of the early challenges to the Policy was a 1990 case, *Pathfinder Fund v. Agency for International Development*.<sup>73</sup> The plaintiffs, three DNGOs, argued that the Policy "abridge[d] their First Amendment rights of free speech and association by effectively preventing them from joining overseas family planning groups in abortion related projects."<sup>74</sup> The court entered summary judgement for the defendant and dismissed Pathfinder's claim because it found that their right to free speech and association was not "substantially burdened" and the Policy was "rationally related to a legitimate government interest."<sup>75</sup>

These challenges to the Policy demonstrate the DNGOs' and FNGOs' immediate awareness of the impact the Policy had on their ability to work abroad on abortion-related activities. Despite early findings that FNGOs lack standing to claim protection under the First Amendment, they still sought recourse with U.S. courts. Indeed, organizations have since continued to challenge the constitutionality of the Policy and advocate for its repeal because of its increasingly detrimental effects on the lives of women in developing countries and, generally, global health initiatives.<sup>76</sup> The consistent rescission and reinstatement of the Policy allows for a better understanding of how the Policy has changed with each administration and how organizations and communities are actually impacted.

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1373, 1388 (2014).

70. 915 F.2d 59, 59 (2d Cir. 1990).

71. *Id.* at 62.

72. *Id.* at 63.

73. 746 F. Supp. 192, 193 (D.D.C. 1990).

74. *Id.*

75. *Id.* at 199; *see also* Aguilar, *supra* note 36, at 72.

76. *See, e.g.,* Jennifer Kates & Kellie Moss, *What is the Scope of the Mexico City Policy: Assessing Abortion Laws in Countries that Receive U.S. Global Health Assistance*, KFF: GLOBAL HEALTH POL'Y (May 3, 2017), <https://www.kff.org/global-health-policy/issue-brief/what-is-the-scope-of-the-mexico-city-policy-assessing-abortion-laws-in-countries-that-receive-u-s-global-health-assistance/> [<https://perma.cc/PUA5-4834>]; Jonathan Watts, 'Global Gag Rule' Could Have Dire Impact in Latin America, *Activists Warn*, THE GUARDIAN (Jan. 26, 2017, 4:00 PM), <https://www.theguardian.com/global-development/2017/jan/26/global-gag-rule-latin-america-abortion-contraception> [<https://perma.cc/4645-ZXVH>]; Talbot, *supra* note 13.

## 2. The Political Football

The Policy remained in effect until Bill Clinton became President in 1993. Two days after being sworn into office, President Clinton revoked the Policy and in his Memorandum on the Mexico City Policy said, “These excessively broad anti-abortion conditions are unwarranted . . . [and] not mandated by the Foreign Assistance Act or any other law.”<sup>77</sup> In fact, after lifting the Policy, U.S. officials highlighted the administration’s support for “family planning and reproductive health services, improving the status of women, and providing access to safe abortion” at the 1994 Cairo Conference.<sup>78</sup>

However, by 1995, it was clear that the Republican-majority Congress (as a result of the November congressional elections) would try to restore the Policy through legislation.<sup>79</sup> In 1998, Congress sent President Clinton legislation that authorized payment of back dues to the United Nations and reinstated the Policy.<sup>80</sup> Threatened by the potential loss of a General Assembly vote by the United Nations, President Clinton accepted the reinstatement of the Policy for one year in order to pay the nearly \$1 billion that the United States owed to the United Nations.<sup>81</sup> The legislation required that FNGOs and other multilateral organizations sign a certification that they have not, and will not, perform abortions or lobby foreign governments to alter<sup>82</sup> abortion laws with any funds regardless of the source.<sup>83</sup> In an effort to limit the impact of the certification, Clinton instructed USAID to interpret the law “in such a way as to minimize to the extent possible the impact on international family planning efforts and to respect the rights of citizens to speak freely on issues of importance in their countries, such as the rights of women to make their own reproductive decisions.”<sup>84</sup> Additionally, the President was authorized to waive this certification requirement for up to \$15 million to groups, but with a \$12.5 million penalty out of the overall population aid appropriated to child health programs.<sup>85</sup> President Clinton used this waiver for nine organizations that refused to sign the certification.<sup>86</sup>

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77. Memorandum on the Mexico City Policy, 1 PUB. PAPERS 10 (Jan. 22, 1993).

78. LARRY NOWELS, POPULATION ASSISTANCE AND FAMILY PLANNING PROGRAMS: ISSUE FOR CONGRESS, CRS ISSUE BRIEF FOR CONGRESS, at CRS-2 (2003).

79. See Susan A. Cohen, *Abortion Politics and U.S. Population Aid: Coping with a Complex New Law*, 26 INT’L FAMILY PLANNING PERSP. 137, 137 (2000).

80. *Id.*; see also Seevers, *supra* note 5, at 908; Crimm, *supra* note 2, at 604.

81. Consolidated Appropriations Act of 2000, Pub. L. No. 106-113, § 599D, 113 Stat. 1501 (1999); see also NOWELS, *supra* note 78, at CRS-5.

82. USAID defined efforts to “alter” abortion laws in the following manner: “directly communicating with political leaders or government officials either in support of or opposition to laws or policies relating to abortion; conducting public outreach efforts intended to alter abortions laws or policies (as opposed to those that may merely have that effect); and organizing demonstrations or media events with the same intent.” Cohen, *supra* note 79, at 138.

83. NOWELS, *supra* note 78, at CRS-5; Crimm, *supra* note 2, at 604.

84. Cohen, *supra* note 79, at 138.

85. NOWELS, *supra* note 78, at CRS-5.

86. Among those that refused to sign the certifications were the World Health Organization, the International Planned Parenthood Federation, and seven others. All nine organizations received \$8.4 million in grants for the 2000 fiscal year. *Id.*

The political back and forth continued in 2001. As one of his first official acts in office, President George W. Bush restored the full terms of the Mexico City Policy that President Reagan instituted in 1984.<sup>87</sup> Bush said that it was his “conviction that taxpayer funds should not be used to pay for abortions or advocate or actively promote abortion, either here or abroad.”<sup>88</sup> Furthermore, in 2003, President Bush, in an attempt to garner more support from the religious right for his upcoming reelection, expanded the Policy to include any organization that receives U.S. funds under the FAA through USAID or other programs run by the State Department.<sup>89</sup> However, noting that the Policy and FAA are “excessively broad conditions on grants and assistance awards are unwarranted” and “have undermined efforts to promote safe and effective voluntary family planning programs in foreign nations,” President Barack Obama revoked Bush’s reinstatement of the Policy and expansion of the Policy in 2009.<sup>90</sup>

The United States continues lurching back and forth on this Policy, and generally on sexual and reproductive rights. The lines between Democratic and Republican presidents regarding the Policy are, indeed, clear. However, the political football that has become of the Policy depending on the prevailing politics is deeply problematic. The Policy, when implemented, has led to consistent closing of programs throughout the developing world, has gagged several from lobbying their government, and has not resulted in a decrease in abortion.<sup>91</sup> President Trump continued the work of

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87. Memorandum for the Administrator of the United States Agency for International Development (Jan. 22, 2001) [hereinafter USAID Memorandum]. The reinstatement was immediately challenged in July 2001 in *Center for Reproductive Law & Policy v. Bush*. The Center, a DNGO, works in collaboration with FNGOs and advocates for global abortion reform. The Center argued that the Policy violated international law and U.S. constitutional law. The lower court dismissed the case for lack of standing. The appellate court, on the merits, held that there was no First Amendment violation. Several of the Center’s other constitutional claims were dismissed on standing issues. See 304 F.3d 183 (2d Cir. 2002).

88. USAID Memorandum, *supra* note 87.

89. United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003, Pub. L. No. 108-25, § 301(b), 117 Stat. 711 (2003). The original Policy only applied to funding through USAID. Importantly, several members of Congress requested that President Bush expand the Policy to also include U.S.-based organization, “a move that would clearly be unconstitutional, and also apply to U.S. assistance for international HIV/AIDS programs.” Ernst et al., *supra* note 17, at 783.

90. Memorandum for the Secretary of State and the Administrator of the United States Agency for International Development, 74 Fed. Reg. 4903 (Jan. 28, 2009); see also Press Release, USAID Press Office, President Obama Rescinds Mexico City Policy (Jan. 26, 2009), <https://www.usaid.gov/news-information/press-releases/president-obama-rescinds-mexico-city-policy> [<https://perma.cc/KH2J-E6HK>]; Jake Tapper, Sunlen Miller & Huma Khan, *Obama Overturns Mexico City Policy Implemented by Reagan*, ABC NEWS (Jan. 23, 2009, 12:59 PM), <https://abcnews.go.com/Politics/International/obama-overturns-mexico-city-policy-implemented-reagan/story?id=6716958> [<https://perma.cc/R9H4-SJX7>] (reporting Obama’s statement: “We are reminded that this decision not only protects women’s health and reproductive freedom but stands for a broader principle: that government should not intrude on our more private family matters. I remain committed to protecting a woman’s right to choose.”).

91. See, e.g., ERAN BENDAVID, PATRICK AVILA & GRANT MILLER, *THE MEXICO CITY POLICY AND ABORTION IN AFRICA: UNITED STATES AID POLICY AND INDUCED ABORTION IN*

previous Republican administrations by reinstating the Policy, but with his own twist that greatly increased its harms.

### 3. Trump's Global Gag Rule

Three days after his inauguration and two days after the 2017 Women's March,<sup>92</sup> President Donald Trump reinstated and greatly *expanded* the reach of the Policy<sup>93</sup> that plays politics with women's lives.<sup>94</sup> Trump's GGR, officially named "Protecting Life in Global Health Assistance,"<sup>95</sup> "represents a wider attack on global health aid writ large."<sup>96</sup> The Trump GGR extends the traditional Policy beyond the historically consistent \$600 million in family planning to \$8.8 billion in global health funding.<sup>97</sup> Indeed, the Policy formerly applied to USAID, but now applies to "global health assistance furnished by all departments or agencies."<sup>98</sup> This essentially now includes the State Department, Department of Defense, and Department of Health and Human Services. The expansion from beyond family planning to global health assistance, and not only family planning, means that the Trump GGR applies to FNGOs working on health programs in the following areas: maternal and child health, nutrition, HIV/AIDS, tuberculosis, malaria under the President's Malaria Initiative, the Zika virus, neglected tropical diseases, and global health security.<sup>99</sup>

Trump's GGR requires that recipient FNGOs and sub-recipients agree that they will not "perform or actively promote abortion as a method of family planning in foreign countries or provide financial support to any other [FNGO] that conducts

SUB-SAHARAN AFRICA, BULLETIN OF THE WORLD HEALTH ORGANIZATION (2011), <https://www.who.int/bulletin/11-091660.pdf> [<https://perma.cc/D8G2-DUFA>].

92. Anemona Hartocollis & Yamiche Alcindor, *Women's March Highlights as Huge Crowds Protest Trump: 'We're Not Going Away,'* N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/womens-march.html> [<https://perma.cc/2EM4-MYCX>].

93. Presidential Memorandum Regarding the Mexico City Policy (Jan. 23, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-mexico-city-policy/>; see also Barbara Stark, *Mr. Trump's Contribution to Women's Human Rights*, 24 ILSA J. INT'L & COMP. L. 317, 339 (2018) ("Trump has taken the Gag Rule to a new level.").

94. Lewis, *supra* note 1, at 2 (reporting a statement from the Regional Director of International Planned Parenthood/Western Hemispheric Region: "[W]e refuse to sign a law that plays with women's lives and flies in the face of public health research that shows that banning the procedure leads to more death and injury for women, particularly the poorest women.>").

95. DEP'T OF STATE, PROTECTING LIFE IN GLOBAL HEALTH ASSISTANCE: SIX-MONTH REVIEW (2018) [hereinafter PLGHA SIX-MONTH REVIEW], <https://www.state.gov/f/releases/other/278012.htm> [<https://perma.cc/XH5W-ZF6W>].

96. Ann M. Starrs, *The Trump Global Gag Rule: An Attack on US Family Planning and Global Health Aid*, 389 THE LANCET 485, 485 (2017).

97. Andrea Montes, *Reinstatement of the Global Gag Rule in 2017: Playing Politics with Women's Lives around the World*, 42 NOVA L. REV. 285, 288 (2018).

98. PLGHA SIX-MONTH REVIEW, *supra* note 94; see also Stark, *supra* note 92, at 340; Starrs, *supra* note 96, at 485.

99. Starrs, *supra* note 96, at 485; KFF Explainer, *supra* note 55.

such activities.”<sup>100</sup> The State Department explained that “actively promot[ing] abortion” means “to commit resources, financial or other, in a substantial or continuing effort to increase the availability or use of abortion as a method of family planning.”<sup>101</sup> For example, counseling and informing women of abortion as a method of family planning, advising women that abortion is an available option, lobbying foreign governments to reform abortion laws to permit abortion as a method of family planning, and conducting abortion information campaigns in foreign countries are forms of “actively promoting abortion.”<sup>102</sup> With regard to “financial support,” some organizations have interpreted it to mean that FNGOs subject to the Policy cannot fund other organizations that perform activities that the FNGO is itself prohibited from undertaking.<sup>103</sup>

Trump’s GGR does afford FNGOs some exceptions to the standard provisions. First, FNGOs are not considered to be actively promoting abortion if they passively answer any questions regarding “where a safe, legal abortion may be obtained . . . if the woman who is already pregnant specifically asks the questions.”<sup>104</sup> Second, FNGOs are allowed to refer women for abortions where the pregnancy was the “result of rape or incest, or if the life of the mother would be endangered if she were to carry the fetus to term,”<sup>105</sup> the woman states that she has decided to have an abortion, the woman asks where she can obtain a legal and safe abortion, and “the healthcare provider reasonably believes that the ethics of the medical profession in the host country requires a response regarding where it may be obtained safely and legally.”<sup>106</sup> Third, FNGOs may treat women “suffering from injuries or illnesses caused by legal or illegal abortions.”<sup>107</sup>

Importantly, FNGOs are prohibited from engaging in such activities using *any* funds, not just U.S. funds.<sup>108</sup> DNGOs, on the other hand, are permitted to perform, counsel, refer, and advocate for abortion using other funds, not U.S. government funds, without losing their U.S. global health assistance funds.<sup>109</sup> This discrepancy

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100. USAID STANDARD PROVISIONS FOR NON-U.S. NONGOVERNMENTAL ORGANIZATIONS: A MANDATORY REFERENCE FOR ADS CHAPTER 303, at 84 (2017) [hereinafter USAID PROVISIONS].

101. *Id.*

102. *Id.* at 89.

103. CHAMPIONS OF GLOBAL REPRODUCTIVE RIGHTS, WHAT YOU NEED TO KNOW ABOUT THE PROTECTING LIFE IN GLOBAL HEALTH ASSISTANCE: RESTRICTION ON U.S. GLOBAL HEALTH ASSISTANCE, AN UNOFFICIAL GUIDE 3–4 (2017) [hereinafter PAI].

104. USAID PROVISIONS, *supra* note 100, at 89.

105. *Id.*; *see also* PAI, *supra* note 103, at 4.

106. PAI, *supra* note 103, at 4.

107. USAID PROVISIONS, *supra* note 100, at 89.

108. *Id.* at 86; *see also* PAI, *supra* note 103, at 2 (“The policy prohibits U.S. global health assistance from being provided to [FNGOs] that perform abortion . . . even if these activities are performed with funding from other, non-U.S. government (USG) sources.”).

109. USAID PROVISIONS, *supra* note 100, at 89; *cf.* Heather Blakeman, *Speech-Conditioned Funding and the First Amendment: New Standard, Old Doctrine, Little Impact*, 13 NW. U. J. INT’L HUM. RTS. 1, 47 (2015) (“[S]ome scholars argue the condition inappropriately held foreign organizations to a higher standard than their domestic counterparts, a discrepancy that both undermined fundamental constitutional values that the United States sought to promote internationally and presented the country as being

also existed with previous iterations of the Policy, but the funding stipulation is actually not required by and is, arguably, inconsistent with current statutes—specifically, the Helms Amendment to the Foreign Assistance Act. Indeed, in one of the early challenges to the Policy in 1989, plaintiff FNGOs and DNGOs argued that the Policy’s restriction on the use of even non-U.S. funds violated the FAA because it contravened Congress’s limits and intent. However, the court held that Senator Helms’s statements before Congress regarding the possibility of extending the Helms Amendment to cover non-U.S. funds did not constitute congressional intent or indicate that “Congress has spoken” on the issue.<sup>110</sup> However, given that Trump’s expanded GGR covers *all* global health assistance, and not only the traditional \$600 million in assistance, it is likely the case that Trump’s GGR is inconsistent with the Helms Amendment.

## II. THE POLICY’S IMPACT ON RECIPIENT FNGOS

Supporters argue that the Policy is necessary to prohibit the use of U.S. funds for abortion-related activities. However, qualitative and quantitative evidence suggest that the Policy does not do what it purports to accomplish and, in fact, undermines democratic processes abroad.<sup>111</sup>

First, World Health Organization researchers found a strong association with the Policy and abortion rates in sub-Saharan Africa. The study found “robust empirical patterns suggesting that the Mexico City Policy is associated with increases in abortion rates in sub-Saharan African countries” in which organizations are subject to the Policy.<sup>112</sup> Specifically, the abortion rates were found to noticeably increase after the Policy was reinstated in 2001, and the odds of a woman having an abortion doubled in areas that were exposed to the Policy.<sup>113</sup> In terms of more qualitative and anecdotal evidence regarding the effectiveness of the Policy, several organizations that have been affected by the Policy have said that they have had to choose whether to forgo the funding, risk having to close their clinics, or reduce staff and services.<sup>114</sup> This has resulted in a lack of access to family planning and reproductive health

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hypocritical.”)

110. *DKT Memorial Fund Ltd. v. Agency for Int’l Dev.*, 887 F.2d 275, 280 (D.C. Cir. 1989); *see supra* Section I.A.

111. Starrs, *supra* note 96, at 485. It should be noted that the Policy, and now Trump’s GGR, affects sixty-four countries because, in the 2016 fiscal year, the United States provided these countries with bilateral global health assistance. Of those sixty-four, thirty-seven countries allow legal abortion in a manner that violates the Policy. This means that in those thirty-seven countries, even though abortion is legal in some cases, the Policy would prevent FNGOs from legally performing abortions. Additionally, in twenty-seven of the sixty-four countries, abortion is not legal in any case and the Policy would prohibit FNGOs from advocating for abortion reform. *See Kates & Moss, supra* note 76.

112. Bendavid, *supra* note 91, at 8.

113. *Id.*

114. *Kate & Moss, supra* note 76.

services for several thousands of women in various countries.<sup>115</sup> For example, an organization in Kenya reported closing two of their clinics because of the Policy.<sup>116</sup>

Second, the Policy's requirement that FNGOs not engage in any promotion, advocacy of, or lobbying for abortion has effectively stifled and chilled any efforts to reform abortion in many developing countries.<sup>117</sup> This requirement is problematic for three reasons. First, there is a general understanding among scholars that the Policy, and specifically the gagging of FNGOs, represents a desire from politicians to impose their own religious moral values onto recipient countries, which tend to be developing countries.<sup>118</sup> Second, the imposition of the gag rule highlights the hypocrisy of the Policy. The Policy does not allow FNGOs to provide services—abortion—that women in the United States can obtain, within some limits.<sup>119</sup> Essentially, the Policy allows the U.S. government, and specifically conservative politicians, to do to foreign women what they cannot do to American women.

Third, the egregious gag on FNGOs contradicts American foreign policy goals and fundamental First Amendment values. For instance, USAID has a stated goal of expanding democracy and improving the lives of citizens of the developing world.<sup>120</sup> However, the gag prevents FNGOs from participating in democratic processes, such as lobbying and advocating for abortion reform, and engaging in public awareness campaigns—all forms of democratic participation that American citizens and U.S.-based organizations engage in. Notably, USAID has recognized the importance of civil participation by organizations when it identified civil society organizations as an important component of the freedom of association and acknowledged that such

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115. KFF Explainer, *supra* note 55; *see also* *Hearing Before the S. Comm. on Foreign Relations, supra* note 16, at 36 (Statement of Dr. Nirmal K. Bista, Director General, Family Planning Association of Nepal, Kathmandu, Nepal) (“[Family Planning Association of Nepal] has recently made the difficult and painful decision to refuse USAID family planning funds because of the global gag rule restrictions. This was by no means an easy decision. It will lead to the loss of almost \$250,000 in U.S. funds and it will have a major impact on our ability to continue to operate reproductive health clinics in Nepal’s three most densely populated areas.”).

116. Ishbel Matheson, *Kenya Split over Bush Abortion Policy*, BBC NEWS (Feb. 23, 2002), <http://news.bbc.co.uk/2/hi/africa/1837283.stm> [<https://perma.cc/LVR5-CGHP>]. *See generally* DINA BOCHEGO, ACCESS DENIED: THE IMPACT OF THE GLOBAL GAG RULE IN KENYA, THE GLOBAL GAG RULE IMPACT PROJECT (2016), <https://pai.org/wp-content/uploads/2016/12/Access-Denied-The-Impact-of-the-Global-Gag-Rule-in-Kenya.pdf> [<https://perma.cc/54NL-EJK2>].

117. Crimm, *supra* note 2, at 612.

118. *Id.* at 589; *see also* Hahn, *supra* note 25, at 421 (“This policy advances the GOP’s Christian anti-abortion stance to an international level; and while the American government has a constitutional requirement for the separation of church and state, Christian views are being advanced by this executive order.”); SeEVERS, *supra* note 5, at 905 (stating that the Policy “foists the moral and ethical values of the United States’ conservative and religious right on international health advocates, and presses a pro-life agenda on any [FNGO] receiving U.S. funding”).

119. *See* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878–79 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

120. *Mission, Vision and Values*, USAID (Feb. 16, 2018), <https://www.usaid.gov/who-we-are/mission-vision-values> [<https://perma.cc/2TLG-5SX2>].

organizations “play a vital role in educating the public and the government on important local and national issues.”<sup>121</sup>

However, the gag substantially undermines this view. For example, the director general, Dr. Nirmal K. Bista, from the Family Planning Association of Nepal (FPAN), explained how the gag rule affects the organization. FPAN took part in a movement, led by the Nepalese government, to address high maternal mortality rates in Nepal.<sup>122</sup> The government concluded that one of the best ways to address the maternal mortality rate was to legalize abortion, and the Nepalese Ministry of Health therefore sought to introduce legislation to decriminalize abortion.<sup>123</sup> Accordingly, FPAN and a coalition of doctors, health NGOs, human rights activists, and women’s groups spearheaded an advocacy campaign in favor of legalizing abortion.<sup>124</sup> Dr. Bista testified, however, that FPAN decided to forgo USAID funding because it would mean that FPAN could not engage in any advocacy effort to legalize abortion in Nepal, even if the efforts were carried out with non-U.S. money and with the support of the Nepalese government.<sup>125</sup> At the core of this issue is the categorical inability to participate in the democratic processes; indeed, Dr. Bista said, “I would be prevented from speaking in my own country to my own government about a health care crisis I know firsthand, but, by rejecting U.S. funds, I put our clinics, clinics addressing that same health care crisis, in very real jeopardy.”<sup>126</sup>

Opponents of the Policy dubbed it the “Global Gag Rule” for a reason—the Policy, in a very real sense, prevents citizens in foreign countries and FNGOs who work on important health care and women’s reproductive health issues from speaking about abortion.<sup>127</sup> The gag is, at its core, a misguided Policy that assumes that abortion issues around the world are analogous to those in the United States. As Dr. Bista points out, “[i]t is hard, then, to understand how U.S. lawmakers are so

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121. US AGENCY FOR INTERNATIONAL DEVELOPMENT, CENTER FOR DEMOCRACY AND GOVERNANCE, *DEMOCRACY AND GOVERNANCE: A CONCEPTUAL FRAMEWORK* 5 (1998) [hereinafter *DEMOCRACY AND GOVERNANCE*]; see also USAID STRATEGY ON DEMOCRACY, HUMAN RIGHTS, AND GOVERNANCE, CENTER FOR DEMOCRACY AND GOVERNANCE 4 (2013); SeEVERS, *supra* note 5, at 919 (“NGOs were recognized by USAID as essential actors in democracy promotion, however much of an NGO’s ability to foster democratic participation hinges on its ability to speak openly and advocate to local and national government actors.”).

122. *Hearing Before the S. Comm. on Foreign Relations, supra* note 16, at 37 (Statement of Dr. Nirmal K. Bista, Director General, Family Planning Association of Nepal, Kathmandu, Nepal). It should be note that, at the time of Dr. Bista’s testimony, Nepal had one of the highest maternal mortality rates in the world—much of it because of unsafe abortion. See *id.* Consequently, women who are found to have had an abortion are imprisoned. At the time of Dr. Bista’s testimony, “[o]ne in five women [were] imprisoned in Nepal” for having obtained an abortion. *Id.* at 38.

123. *Id.*

124. *Id.*

125. *Id.* at 37.

126. *Id.*

127. Smith, Martinez & Mor, *supra* note 5. Latin American NGOs have created an advocacy strategy that includes communicating with government officials and campaigning to build awareness of abortion issues. The gag undermines these efforts; see also Bonnie L. Shepard, *NGO Advocacy Networks in Latin America: Lessons from Experience in Promoting Women’s and Reproductive Rights*, at 9 (North-South Agenda, Paper No. 61, 2003).

easily able to implement such a far-reaching and damaging policy when the differences between our countries are so vast and the realities that women in Nepal face are so unimaginable.”<sup>128</sup>

The Policy has been challenged several times because of its problematic effects on recipient FNGOs and foreign citizens, but such challenges have been unsuccessful because of issues demonstrating standing.<sup>129</sup> However, immediately after Trump reinstated his version of the GGR, a bipartisan group of senators sought to permanently repeal it. For instance, Senator Jeanne Shaheen introduced legislation aimed at repealing Trump’s GGR (essentially doing what Republicans did to President Clinton).<sup>130</sup> The following Part explores recent challenges to the constitutionality of the Policy and examines how the Policy undermines and is contrary to First Amendment values.

### III. THE POLICY & THE FIRST AMENDMENT

The Policy is widely controversial because it would be considered an unconstitutional infringement on First Amendment grounds if it were applied to DNGOs. This misalignment between what is permitted at home and what is permitted abroad fundamentally undermines the United States’ position as the world’s model democracy.<sup>131</sup> This Part examines this misalignment through the unconstitutional conditions doctrine, government speech, and First Amendment values in order to argue that the Policy, notwithstanding standing issues,<sup>132</sup> should be considered unconstitutional because it fundamentally conflicts with First Amendment values.

#### A. Unconstitutional Conditions Doctrine

Generally, the unconstitutional conditions doctrine provides that the “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether.”<sup>133</sup> That is, even

128. *Hearing Before the S. Comm. on Foreign Relations, supra* note 16, at 38 (Statement of Dr. Nirmal K. Bista, Director General, Family Planning Association of Nepal, Kathmandu, Nepal).

129. *See supra* Section I.C.

130. *See* Global Health, Empowerment and Rights Act, S. 210, 115th Cong. (2017), <https://www.congress.gov/bill/115th-congress/senate-bill/210> [<https://perma.cc/HY4A-F5RH>]; *see also supra* Section I.C.2; *Shaheen Challenges Sec. Tillerson on Global Gag Rule*, JEANNE SHAHEEN: U.S. SENATOR FOR N.H. (June 13, 2017), <https://www.shaheen.senate.gov/news/multimedia/watch/shaheen-challenges-sec-tillerson-on-global-gag-rule> [<https://perma.cc/74SB-BDHG>].

131. *See* Crimm, *supra* note 2, at 618.

132. *Cf.* Blakeman, *supra* note 109, at 28 (“Because Congress can allocate foreign aid funds to foreign recipients, who are not entitled to First Amendment protection, instead of to U.S. recipients, it can bypass the constitutional limits on speech-conditioned foreign aid funding.”).

133. Crimm, *supra* note 2, at 618 (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1989)); *see also* Chase Ruffin, *You Don’t Have*

if the individual or organization has no entitlement to the government benefit, funding, or aid, a condition that infringes on the recipient's constitutionally protected rights, such as the First Amendment, is unconstitutional.<sup>134</sup> The government cannot coerce individuals or organizations into surrendering a constitutional right in order to obtain some funding or aid.<sup>135</sup> The doctrine reflects the notion that "government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt."<sup>136</sup> For example, in *Speiser v. Randall*, the Supreme Court held that a state law requiring veterans to take an oath declaring that they would not advocate to overthrow the government in order to receive a tax exemption did not constitute a compelling state interest and resulted in the suppression of protected speech.<sup>137</sup>

### B. Right to Free Speech

Despite much uncertainty regarding whether a government condition implicates free speech, courts have considered, among other things, whether the condition has a coercive effect on the recipient, whether the condition constitutes government speech, and whether the condition constitutes a viewpoint-based regulation.<sup>138</sup>

#### 1. *Rust v. Sullivan*

In *Rust v. Sullivan*, the Court upheld conditions attached to funding from the Department of Health and Human Services through Title X.<sup>139</sup> The conditions prohibited recipients from using Title X funding for family planning programs in which abortion was considered a method of family planning.<sup>140</sup> The conditions prohibited recipients from (1) "provid[ing] counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning,"<sup>141</sup> (2) "engaging in activities that 'encourage, promote or advocate abortion as a method of family planning,'"<sup>142</sup> and (3) requiring that recipient Title X

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*to, but It's in Your Best Interest: Requiring Express Ideological Statements as Conditions on Federal Funding*, 29 GA. ST. U. L. REV. 1129, 1131 (2013).

134. Blakeman, *supra* note 109, at 33; *see also* United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (holding that the Children's Internet Protection Act did not impose an unconstitutional condition on public libraries and did not violate library patrons' First Amendment rights).

135. The governmental condition need not be inherently coercive. "[The doctrine] seeks to identify those conditions on funding that have a coercive effect on the recipient's freedom to exercise her constitutional rights on her own time and with her own resources." David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 680 (1992).

136. Sullivan, *supra* note 133, at 1415.

137. *See generally* Speiser v. Randall, 357 U.S. 513 (1958).

138. Ruffin, *supra* note 133, at 1134.

139. 500 U.S. 173 (1991).

140. *Id.*

141. *Id.* at 179.

142. *Id.* at 180 (quoting 42 CFR § 59.8(a)(1) (1989)).

projects be organized so that they are “‘physically and financially separate’ from prohibited abortion activities” (in other words, keeping the funds separated).<sup>143</sup>

Petitioners challenged the conditions on First Amendment grounds and argued that the conditions “violate the free speech rights of private health care organizations that receive Title X funds . . . by impermissibly imposing viewpoint-discriminatory conditions on government subsidies and thus penalize speech funded with non-Title X monies.”<sup>144</sup> In addition, the Petitioners contended that the restrictions were impermissible because they required the relinquishment of their constitutional right to engage in abortion advocacy and counseling.<sup>145</sup> The Petitioners acknowledged that the government can legally impose conditions, but “it may not discriminate invidiously in its subsidies in such a way as to ai[m] at the suppression of dangerous ideas.”<sup>146</sup>

Writing for the majority, Chief Justice Rehnquist rejected the Petitioners’ arguments and upheld the conditions attached to the Title X funding. First, Rehnquist noted that Title X recipients can engage in activities otherwise prohibited by Title X with their non-Title X funds.<sup>147</sup> That is, the government is not denying a benefit but rather requiring that the Title X funds “be spent for the purposes for which they were authorized.”<sup>148</sup> Justice Rehnquist also rejected the Petitioners’ argument that the Title X conditions aim at suppressing “dangerous ideas,” and instead found that the restriction is a “prohibition on a project grantee . . . from engaging in activities outside the project’s scope.”<sup>149</sup>

Additionally, the majority rejected the argument that the restrictions constituted viewpoint discrimination because it permitted antiabortion speech and acts while impermissibly discriminating against pro-abortion speech. The Court noted that the Petitioners’ logic incorrectly “boil[ed] down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights.”<sup>150</sup> In other words, the government may selectively fund programs to the exclusion of others without discriminating on the basis of viewpoint.<sup>151</sup> In effect, the government can make value judgements regarding the programs it chooses to fund because subsidies are just subsidies.<sup>152</sup>

With regard to government speech, the Title X programs were interpreted as venues of government speech that are transmitted through private doctors.<sup>153</sup>

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143. *Id.* (42 CFR § 59.9 (1989)).

144. *Id.* at 192 (internal quotation marks omitted).

145. *Id.* at 196.

146. *Id.* at 192 (alteration in original) (internal quotation marks omitted) (quoting *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 548 (1983)).

147. *Id.* at 196–97.

148. *Id.* at 196.

149. *Id.* at 194.

150. *Id.*; see Crimm, *supra* note 2, at 620.

151. Ruffin, *supra* note 133, at 1138; see also Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v. Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 37 (1992).

152. Kagan, *supra* note 151, at 37.

153. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (explaining that *Rust* allows viewpoint-based funding because the government was speaking through a private entity).

Generally, the government may “speak” to further its policies by funding private entities to convey government speech, but it may not regulate speech based on viewpoints.<sup>154</sup> Government speech has been largely criticized because “[w]hen the government speaks through subsidy schemes, it may change and reshape the underlying dialogue.”<sup>155</sup> Speakers may forgo speech because the government decided not to fund them, government funding may distort the private speech it funds, and, overall, “[w]e do not know whether to treat the speakers as independent or hired guns.”<sup>156</sup> This issue is particularly salient in the realm of abortion funding, as it was in *Rust*, because the government’s selective subsidization of some speech, to the exclusion of others, means that the government can steer “public discourse on controversial issues.”<sup>157</sup>

## 2. *Alliance for Open Society International v. USAID*

Furthermore, the Court distinguished *Rust* in *Alliance for Open Society International v. USAID*.<sup>158</sup> In *Alliance*, three DNGOs that worked to eliminate the spread of HIV/AIDS often worked closely with those engaged in prostitution.<sup>159</sup> Two of the organizations were receiving federal funds under the U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 (“Leadership Act”), and were thus required to expressly oppose prostitution.<sup>160</sup> The plaintiff DNGOs argued that the condition compelled them to engage in speech and coerced them to refrain from activities that were financed solely from private funds.<sup>161</sup> The Court held that the conditions attached to the funding violated the First Amendment because they required “recipients to profess a specific belief, the Policy Requirement [went] beyond defining the limits of the federally funded program to defining the recipient.”<sup>162</sup> The Court distinguished this holding from *Rust* by noting that in *Rust* the conditions placed were “designed to ensure that the limits of the federal program” were observed.<sup>163</sup> However, the Leadership Act went beyond the limits of the federally funded program.<sup>164</sup>

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154. Ruffin, *supra* note 133, at 1139; *see also* Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543, 577 (1996) (explaining that “government may not foster public acceptance of its own viewpoints on these issues by manipulating private expression”).

155. Kagan, *supra* note 151, at 55; *see also* Helen Norton, *The Measure of Government Speech: Identifying Expression’s Source*, 88 B.U. L. REV. 587, 596 (2008) (explaining the concern that “the government may manipulate the public’s attitudes towards its views by deliberately obscuring its identity as a message’s source”).

156. Kagan, *supra* note 151, at 55.

157. Ruffin, *supra* note 133, at 1140; *see* Kagan, *supra* note 151, at 55.

158. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013).

159. *Id.* at 210–11.

160. *Id.*

161. *Id.*

162. *Id.* at 218.

163. *Id.* at 217 (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

164. *Id.* at 218. Justice Scalia dissented arguing that the Act’s restrictions were indeed within the program’s mandate because the elimination or prostitution falls within the goals of the HIV/AIDS program. *See id.* at 224 (Scalia, J., dissenting).

### 3. The Policy and Free Speech

If the Trump GGR and its previous iterations were applied domestically, it would likely be considered unconstitutional.<sup>165</sup> Indeed, what distinguishes the Policy from *Rust* and *Alliance* is that there is no separation in the use of funds; the Policy restricts the use of all funds for all abortion-related activities, including performing abortion and advocating for abortion reform.<sup>166</sup> That is to say, the Policy's requirement that recipients categorically refrain from abortion-related activities using any funds is an unconstitutional condition on funding. In *Rust*, the Court found that the restriction on Title X funds was meant to ensure that "public funds be spent for the purposes for which they were authorized."<sup>167</sup> Chief Justice Rehnquist also noted that the recipients of Title X funds could still engage in abortion-related activities "through programs that are separate and independent from the project that receives Title X funds."<sup>168</sup>

Herein lies the unconstitutionality of the Policy. The Policy does not allow for "separate and independent" projects. It requires that recipient FNGOs refrain from engaging in *any* activity that relates to abortion. This is most clearly seen with the use of funds—the Policy does not allow recipients to use non-U.S. funds for abortion-related activities. With the Trump GGR, the unconstitutionality of the conditions is even more visible. Since the conditions now apply to all funds for global health assistance, including organizations that primarily specialize in, for example, HIV/AIDS or the Zika virus, nonabortion-specific FNGOs cannot coordinate with FNGOs that engage in abortion-related services because the Trump GGR does not permit it. That is, nonabortion organizations are likely less inclined to seek partnerships with abortion-specific organizations out of fear that they will get "linked to something controversial that could affect them."<sup>169</sup> If DNGOs were not allowed to

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165. This argument does not take into consideration issues of standing. *See supra* Section I.C.1 (explaining unsuccessful early challenges to the Policy). Instead, this argument focuses on whether the Policy would be considered constitutional if applied to domestic organizations. However, several have argued that issues of standing should not restrict an FNGO from challenging the Policy. *See, e.g.,* Su, *supra* note 69; Zick, *supra* note 18; Timothy Zick, *The First Amendment in Transborder Perspective: Toward a More Cosmopolitan Orientation*, 52 B.C. L. REV. 941 (2011).

166. Crimm has argued that the Policy would be considered unconstitutional under *Rust* because, if the Policy conditions were applied to DNGOs, it would "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 [First Amendment] protected conduct outside the scope of the federally funded program.'" Crimm, *supra* note 2, at 629 (emphasis omitted) (quoting *Rust*, 500 U.S. at 173).

167. *Rust*, 500 U.S. at 196.

168. *Id.*

169. *Cf.* CTR. FOR REPROD. RIGHTS, BREAKING THE SILENCE: THE GLOBAL GAG RULE'S IMPACT ON UNSAFE ABORTION, 11 (2003) [hereinafter BREAKING THE SILENCE]; Starrs, *supra* note 96, at 486 ("NGOs in low-income settings often provide integrated health services; for instance, they offer patients contraceptive care, HIV prevention or treatment, maternal health screenings, immunisations [sic], and information on safe abortion care all under one roof. By expanding the gag rule to the full scope of US global health aid, hundreds more national and local NGOs will be forced to choose between drastic funding cuts (if they decline to sign the gag rule) or denying their patients . . . information.").

engage in abortion-related services with non-U.S. funds, as the Policy currently requires of FNGOs, the condition would very likely be considered unconstitutional under *Rust*.

The fact that a court would find the Policy unconstitutional if it were applied to domestic organizations is deeply problematic because it “presents the United States as two-faced.”<sup>170</sup> If the United States is to maintain its standing as the world’s model democracy, it should not undermine democratic ideals and First Amendment doctrine and values in other countries. The following Part explains these First Amendment values and argues that, in order to abide by these values, the United States should repeal this far-reaching Policy.

#### IV. AN APPEAL TO FIRST AMENDMENT VALUES

The First Amendment does not, and should not, merely protect “speech as such.”<sup>171</sup> The scope of the Amendment extends to speech that implicates core constitutional values: the marketplace of ideas, individual autonomy, and democratic self-government. These values reflect the United States’ deep commitment to protecting freedom of speech.<sup>172</sup> Indeed, U.S. foreign policy is largely premised on the goal of promoting such values abroad in order to ensure global security and peace in developing countries; this belief in the possibility of exporting democracy forms the groundwork for foreign aid programs.<sup>173</sup> The Mexico City Policy presumably once fell into this category of using foreign aid to create stability—in this case, global health security—but is now a mechanism through which the United States exports Republican conservative values regarding abortion and family planning. The consistent rescission and reinstatement of the Policy over the past thirty years is itself telling. If the United States regards First Amendment values as foundational to our commitment to protecting free speech, then the Mexico City Policy should be repealed because it is unconstitutional. The gagging of foreign citizens and foreign nongovernmental organizations is undemocratic and runs contrary to First Amendment values.

In his dissenting opinion in *Abrams v. United States*, Justice Holmes aptly captured the scope of the “marketplace of ideas” when he said:

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>174</sup>

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170. Crimm, *supra* note 2, at 631.

171. Glickman v. Wileman Bros. & Elliott, 521 U.S. 457, 478 (1997) (Souter, J., dissenting); *see also* Post, *supra* note 21, at 478.

172. Post, *supra* note 21, at 477–78.

173. *See generally* DEMOCRACY AND GOVERNANCE, *supra* note 121.

174. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

The “marketplace of ideas” refers to the creation of new knowledge, which requires freedom of thought and of speech.<sup>175</sup> The notion which Holmes captured is that all ideas are worth being expressed, regardless of whether they are “false” or “true.” Indeed, the marketplace will sort out the “good” and “bad” ideas.<sup>176</sup> As such, “[t]he First Amendment recognizes no such things as a ‘false’ idea.”<sup>177</sup> Additionally, the value of individual autonomy refers to the equality of all ideas because of the equality among all speakers. This value is also dubbed “self-fulfillment.” However, this autonomy often conflicts with the autonomy of the listener in situations of, for example, defamation and privacy.<sup>178</sup>

Perhaps most salient for the purposes of this Comment, the value of democratic self-governance refers to the relationship between individuals and their government and to the ability of those individuals to potentially change or author future law, engage in decision-making through elections and referenda, and participate in forming public opinion on issues in controversy.<sup>179</sup> USAID has recognized that a “hallmark of a democratic society is the freedom of individuals to associate with like-minded individuals, express their views publicly, openly debate public policy, and petition their government.”<sup>180</sup> Indeed, it is through the advocacy efforts of such organizations that “people are given a voice in the process of formulating public policy.”<sup>181</sup>

The Mexico City Policy, and now Trump’s GGR, contradicts this foundational understanding of democratic self-governance and the marketplace of ideas. First, by requiring that recipient FNGOs not “perform or actively promote abortion as a method of family planning in foreign countries [or] provide financial support to any other [FNGO] that conducts such activities,”<sup>182</sup> the United States is preventing FNGOs from engaging in core democratic processes. For instance, as explained earlier in this Comment, Dr. Bista and FPAN were put in the unfortunate situation of having to decide whether to accept USAID funds in order to keep open health clinics and thereby be prohibited from advocating for the decriminalization of abortion in order to minimize Nepal’s maternal mortality rate.<sup>183</sup> Dr. Bista and FPAN decided to forgo the funds in order to advocate for reforming abortion laws and potentially help author legislation that decriminalizes abortion in Nepal.

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175. *Cf. All. for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 430 F. Supp. 2d 222, 258 (S.D.N.Y. 2006) (“For the so-called ‘marketplace of ideas’ that is vital for a free society to function properly and to flourish, sustaining the people-to-government power equilibrium as constitutionally calibrated demands a number of checks long recognized in First Amendment jurisprudence.”).

176. *See Post*, *supra* note 21, at 479.

177. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)).

178. *See Post*, *supra* note 21, at 480.

179. *Id.* at 482.

180. DEMOCRACY AND GOVERNANCE, *supra* note 121, at 15; *see also* COHEN, *supra* note 6, at 1.

181. DEMOCRACY AND GOVERNANCE, *supra* note 121, at 15.

182. USAID PROVISIONS, *supra* note 100, at 86.

183. *See supra* Part II.

Likewise, FNGOs in Latin America have voiced similar concerns regarding the undemocratic nature of the Policy. Susana Silva Galdos, president of the FNGO Movimiento Manuela Ramos, experienced the undemocratic nature of the Policy when she made a statement before the U.S. Senate Committee on Foreign Relations.<sup>184</sup> Movimiento Manuela Ramos, a recipient FNGO, was subject to the gag at the time Galdos gave her statement, which meant that Galdos had to obtain special authorization in federal court to even testify before the Committee. Senator Barbara Boxer noted at the time of the hearing, “It’s almost unimaginable that a witness that a United States Senator asked to come here actually had to go to court to get a restraining order in order to speak in this, the freest and greatest country in the world.”<sup>185</sup> Later in the hearing, Senator Boxer told Galdos; “[Y]ou are ungagged and you are here in the U.S. Senate, and you may take that gag off.”<sup>186</sup> Galdos and Movimiento Manuela Ramos were, in a very real sense, gagged from participating in public policy, from contributing to the efforts in Peru to decriminalize abortion, and, generally, from engaging in one the most fundamental and basic forms of democratic participation.<sup>187</sup>

Second, the Policy has had the effect of chilling speech abroad and thereby undermines the First Amendment value regarding the marketplace of ideas.<sup>188</sup> For example, this categorical prohibition on any abortion advocacy or campaign to raise awareness regarding abortion has had the overall effect of chilling reproductive rights advocacy in Peru.<sup>189</sup> Indeed, some international donors have even stated that “there are fewer groups doing advocacy or fewer groups creating a counter balance against pro-life activists.”<sup>190</sup> An NGO in Peru, referring to the degree of care with which recipient FNGOs must speak, stated that “organizations have to be more careful about getting linked to something controversial that could affect them, and that can produce self-censorship.”<sup>191</sup> Problematically, and contrary to notions regarding the marketplace of ideas, the gag rule supports one-sidedness in public discourse regarding abortion—specifically, in developing countries with harsh antiabortion laws (and sometimes the government’s antiabortion stance is written into the constitution). For instance, a recipient FNGO in Ethiopia noted that debates regarding abortion “will not be informed and balanced if organizations supporting abortion liberalization are unable to speak about it.”<sup>192</sup> The Policy has certainly had a chilling effect on recipient FNGOs by prohibiting them from introducing new knowledge to the marketplace of ideas regarding unsafe and clandestine abortion,

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184. See *Hearing Before the S. Comm. on Foreign Relations, supra* note 16 (statement of Susana Silva Galdos, President, Movement Manuela Ramos, Lima Peru).

185. *Id.* at 2 (statement of Sen. Barbara Boxer).

186. *Id.* at 28.

187. See Seevers, *supra* note 5, at 923 (“[B]ecause the Global Gag Rule creates a barrier to advocacy and a limitation on free speech related to abortion, Peruvian organizations are prevented from addressing one of the major health dangers in Peru.”).

188. Watts, *supra* note 76 (“[The Gag] will have a chilling impact on the work done by US organization that work with Latin American women’s groups that advocate safe abortion.”).

189. Seevers, *supra* note 5, at 927.

190. BREAKING THE SILENCE, *supra* note 169, at 13.

191. *Id.* at 11.

192. *Id.* at 13.

inducing self-censorship because of the fear that the organization will be perceived as violating the gag rule, and skewing public discourse regarding abortion.

Regardless of current First Amendment doctrine regarding unconstitutional conditions, government speech, and free speech, the Policy should be considered unconstitutional and be repealed because it contradicts fundamental First Amendment values, as demonstrated above. In addition, the inherent hypocrisy of the Policy casts an unforgiving shadow on the United States' position as a model democracy for the world. The Policy sends the message that the United States will claim to promote First Amendment values abroad through foreign policy and foreign aid, yet substantially prohibit the realization of such values through the Policy. However, given the back-and-forth nature of the Policy over the past thirty years, it is likely difficult to obtain an outright and permanent repeal. Accordingly, lawmakers should also consider limiting the scope of the Policy so that it is more consistent with the Helms Amendment to the Foreign Assistance Act.<sup>193</sup>

#### CONCLUSION

The Mexico City Policy has been previously justified by the conviction that taxpayers should not have to pay for abortion-related services. Indeed, after reinstating the Policy in 2001, President Bush said that it was his “conviction that taxpayer funds should not be used to pay for abortions or advocate or actively promote abortion, either here or abroad.”<sup>194</sup> This is, of course, a valid motivation, but the consequences of the Policy cannot be justified solely on this motivation. Anecdotal and qualitative evidence has shown that the Policy has incredibly damaging effects on the health of women around the world, undermines democratic values, and does not even accomplish what it purportedly sets out to do—reduce the number of abortions. In light of these findings, this Comment argued that the Policy should be repealed because it would be unconstitutional if applied to DNGOs and, importantly, because it substantially undermines First Amendment values. Women's health and reproductive services around the world should not be left to the political winds.

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193. *See supra* Section I.A.

194. Memorandum on Restoration of the Mexico City Policy, 2001 PUB. PAPERS 10 (Jan. 22, 2001).