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## Reinstatement of The Global Gag Rule in 2017: Playing Politics with Women's Lives Around The World

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# Reinstatement of The Global Gag Rule in 2017: Playing Politics with Women's Lives Around The World

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## **Abstract**

Forty-four years after *Roe v. Wade*, anti-abortionists continue to attack women's reproductive rights, including a woman's constitutional right to obtain an abortion.

# REINSTATEMENT OF THE GLOBAL GAG RULE IN 2017: PLAYING POLITICS WITH WOMEN’S LIVES AROUND THE WORLD

ANDREA MONTES\*

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## I. INTRODUCTION

Forty-four years after *Roe v. Wade*,<sup>1</sup> anti-abortionists continue to attack women's reproductive rights, including a woman's constitutional right to obtain an abortion.<sup>2</sup> The most palpable efforts to restrict abortion rights have been in the form of legislative measures aimed at limiting access to abortion services and imposing economical burdens on low-income women seeking the procedure.<sup>3</sup> The last few years alone account for more than one-quarter of all abortion restrictions enacted since *Roe*.<sup>4</sup> Between 2011 and 2015, state legislatures enacted close to three hundred restrictions on abortion—27% of a total of 1074 restrictions enacted since *Roe* was decided in 1973.<sup>5</sup> The dramatic rise in restrictions in the last six years is partly due to the 2010 congressional midterm elections, when a majority of abortion opponents were elected into office.<sup>6</sup> Since then, state legislatures have incessantly burdened abortion providers and low-income women with unnecessary medical and economic requirements.<sup>7</sup> By enacting restrictive laws under the guise of protecting women's health, state legislatures have

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1. 410 U.S. 113 (1973).

2. See Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman's Private Choice*, 95 TEX. L. REV. 1189, 1189 (2017); PLANNED PARENTHOOD ACTION FUND: *Roe v. Wade*, <http://www.plannedparenthoodaction.org/issues/abortion/roe-v-wade> (last visited Apr. 18, 2018).

3. See *Last Five Years Account for More than One-Quarter of All Abortion Restrictions Enacted Since Roe*, GUTTMACHER INST. (Jan. 13, 2016), <http://www.guttmacher.org/article/2016/01/last-five-years-account-more-one-quarter-all-abortion-restrictions-enacted-roe>.

4. *Id.*; see also *Roe*, 410 U.S. at 113.

5. *Roe*, 410 U.S. at 113; *Last Five Years Account for More than One-Quarter of All Abortion Restrictions Enacted Since Roe*, *supra* note 3.

6. *Last Five Years Account for More than One-Quarter of All Abortion Restrictions Enacted Since Roe*, *supra* note 3.

7. See Bridgette Dunlap, *Trump's Abortion Policy Isn't About Morality—It's Coercion*, ROLLING STONE: POL. (May 22, 2017), <http://www.rollingstone.com/politics/features/trumps-abortion-policy-isnt-about-morality-its-coercion-w483259>.

effectively restricted women from accessing abortion services and comprehensive reproductive healthcare.<sup>8</sup>

Unsurprisingly, abortion was a highly-contested issue during the 2016 presidential race.<sup>9</sup> On the right, Republican presidential nominee, Donald Trump, promised to defund Planned Parenthood and appoint pro-life Supreme Court Justices who would overturn *Roe*.<sup>10</sup> On the left, Democratic nominee, Hillary Rodham Clinton, promised the opposite: She would defend *Roe* and protect a woman's right to choose.<sup>11</sup> Mrs. Clinton further asserted that "women's rights are human rights."<sup>12</sup>

The 2016 presidential race—one of the most divisive ones in recent times—resulted in Mr. Trump's election, and since his inauguration in January 2017, he has swiftly reversed many of his predecessor's policies and programs.<sup>13</sup> True to his word, President Trump promptly took action to restrict women's reproductive rights at all levels of government.<sup>14</sup> On his first full day in office, President Trump reinstated and expanded the *Mexico City Policy* ("the Policy")—a Reagan-era policy that prohibits foreign non-profit organizations or programs receiving federal funding to provide, promote, or make referrals of abortion services.<sup>15</sup> To receive funding, a non-governmental organization ("NGO") must "certify that they will not 'perform or actively promote abortion as a method of family planning'" with any type of funds, *including non-U.S. funds*.<sup>16</sup> The Mexico City Policy, also

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8. *See id.*

9. *See* Adrienne LaFrance, *Clinton's Unapologetic Defense of Abortion Rights*, ATLANTIC: HEALTH (Oct. 20, 2016), <http://www.theatlantic.com/health/archive/2016/10/hillary-clintons-powerful-defense-of-abortion-rights/504866/>; Carter Sherman, *Donald Trump Broke a Lot of Campaign Promises, but He Kept His Word on Abortion*, VICE NEWS (Apr. 26, 2017), <http://news.vice.com/story/donald-trump-100-days-abortion-rights>.

10. Letter from Donald J. Trump, Trump for President, Inc., to Pro-Life Leader (Sept. 2016) (on file with author); Sherman, *supra* note 9; *see also Roe*, 410 U.S. at 113.

11. LaFrance, *supra* note 9; *see also Roe*, 410 U.S. at 113.

12. LaFrance, *supra* note 9.

13. *See* Joseph Cummins, *This Is the Dirtiest Presidential Race Since '72*, POLITICO: HIST. DEP'T. (Feb. 17, 2016), <http://www.politico.com/magazine/story/2016/02/2016-elections-nastiest-presidential-election-since-1972-213644>; Sherman, *supra* note 9.

14. Sherman, *supra* note 9.

15. Memorandum on the Mexico City Policy, 2017 DAILY COMP. PRES. DOC. 63 (Jan. 23, 2017); Anna Diamond, *Trump Strikes at Abortion with a Revived Foreign-Aid Rule*, ATLANTIC: HEALTH (Jan. 23, 2017), <http://www.theatlantic.com/health/archive/2017/01/mexico-city-policy/514010/>.

16. KAISER FAMILY FOUND., *THE MEXICO CITY POLICY: AN EXPLAINER 1* (2017), <http://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer/> (follow "FACT SHEET" hyperlink).

known as the *Global Gag Rule* by its critics, was introduced in 1984 by President Ronald Reagan at the United Nations Population Conference in Mexico City—hence its name.<sup>17</sup> Since then, “it has been rescinded and reinstated by subsequent administrations along party lines.”<sup>18</sup>

In the past, the Global Gag Rule has only applied to family planning assistance with an estimated \$600 million for the 2017 fiscal year—but the expanded version applies to the majority of United States assistance, including Human Immunodeficiency Virus (“HIV”), Acquired Immune Deficiency Syndrome (“AIDS”), U.S. President’s Emergency Plan for AIDS Relief (“PEPFAR”), malaria, tuberculosis, nutrition, global health security, and other program areas.<sup>19</sup> This means that the Policy will impact over \$8 billion allocated to *global health assistance* for the fiscal year in 2017.<sup>20</sup> The Policy’s unprecedented expansion has raised widespread concern among global health organizations and foreign governments, given its disruptive and *potentially devastating effect[s]*.<sup>21</sup> A couple of days after the Policy was reinstated, the Dutch government pledged to set up a fund, called *She Decides*, to support abortion services affected by the Policy.<sup>22</sup> In the United States, President Trump’s supporters lauded his decision to reinstate and expand the Policy, but the Policy’s reinstatement was met with strong opposition as well.<sup>23</sup> Pro-choice advocates have warned that the Policy seriously jeopardizes women’s health and interferes with family planning efforts in the developing world.<sup>24</sup> Moreover, the Policy is inconsistent with American constitutional rights and democratic principles.<sup>25</sup>

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17. *Id.*; Allegra A. Jones, Note, *The “Mexico City Policy” and Its Effects on HIV/AIDS Services in Sub-Saharan Africa*, 24 B.C. THIRD WORLD L.J. 187, 189 (2004).

18. KAISER FAMILY FOUND., *supra* note 16, at 1.

19. Ann M. Starrs, *The Trump Global Gag Rule: An Attack on US Family Planning and Global Health Aid*, 389 LANCET 485, 485 (2017); KAISER FAMILY FOUND., *supra* note 16, at 2.

20. KAISER FAMILY FOUND., *supra* note 16, at 2.

21. Starrs, *supra* note 19, at 485.

22. Claudia Dreifus, *In Response to Trump, a Dutch Minister Launches ‘She Decides’*, N.Y. TIMES: HEALTH (Feb. 20, 2017), <http://www.nytimes.com/2017/02/20/health/lilianne-ploumen-abortion-gag-rule-she-decides.html>.

23. Juliet Perry & Sophie Morlin-Yron, *Where the Mexico City Policy Matters the Most*, CNN, <http://www.cnn.com/2017/04/28/africa/mexico-city-policy-impact/index.html> (last updated May 4, 2017); Molly Redden, *Trump Expands Policy that Bans US Aid for Overseas Abortion Providers*, GUARDIAN US (May 15, 2017, 1:28 PM), <http://www.theguardian.com/world/2017/may/15/trump-abortion-rule-mexico-city-policy>; Sherman, *supra* note 9.

24. Starrs, *supra* note 19, at 486; Perry & Morlin-Yron, *supra* note 23.

25. Susan A. Cohen, *The Mexico City Policy: A ‘Gag Rule’ That Violates Free Speech and Democratic Values*, GUTTMACHER REP. ON PUB. POL’Y, Apr. 1998, at 1, 1–2.

Immediately after President Trump gave the order, United States Senator Jeanne Shaheen and a bipartisan group of senators introduced legislation “to permanently repeal the [Global Gag Rule].”<sup>26</sup> “However, [the proposed legislation] faces an uphill battle” with conservative Republicans controlling both chambers of Congress.<sup>27</sup> Additionally, in a recent Senate Appropriations Subcommittee hearing, Senator Shaheen questioned Secretary of State Rex Tillerson on the potentially devastating impact the Global Gag Rule might have on the multiple programs the Policy encompasses.<sup>28</sup> Secretary Tillerson assured the Appropriations Subcommittee that the State Department would closely observe the Policy’s impact on foreign aid programs, but a comprehensive report is pending.<sup>29</sup>

Still, opponents of the Global Gag Rule could attempt to seek legal recourse and challenge the restrictions constitutionality.<sup>30</sup> In 2013, the Supreme Court of the United States held in *Agency for International Development v. Alliance for Open Society International, Inc.*,<sup>31</sup> that the United States Agency for International Development’s (“USAID”) rule mandating NGOs “to adopt a policy that explicitly opposed prostitution and sex trafficking” or forego federal funding, violated the First Amendment and was therefore unsustainable.<sup>32</sup> Opponents of the Global Gag Rule could argue that similar to the restrictions challenged under *Alliance*, the Global Gag Rule is a restriction on speech or a mandate to adopt the government’s pro-life stance, in violation of the First Amendment.<sup>33</sup> Given that First Amendment rights only protect American citizens, foreign NGOs might not have standing to challenge the Gag Rule—however, domestic NGOs have challenged the rule in the past; and despite losing on the merits, they have

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26. Sophie Edwards, *Q&A: Senator Shaheen on Her Fight to Repeal the ‘Global Gag Rule’ Permanently*, DEVEX: DEV. NEWS (Mar. 13, 2017), <http://www.devex.com/news/89789>.

27. *Id.*

28. Jeanne Shaheen: U.S. Senator N.H., *Shaheen Challenges Sec. Tillerson on Global Gag Rule* at 4:40–6:00, SENATE.GOV (June 13, 2017), <http://www.shaheen.senate.gov/news/multimedia/watch/shaheen-challenges-sec-tillerson-on-global-gag-rule>.

29. *Id.* at 6:00–7:45; see also Press Release, U.S. Dep’t of State, Protecting Life in Global Health Assistance (May 15, 2017) (on file with author).

30. See Kendra Brown, *President Trump Reinstates the Mexico City Policy a.k.a. “Global Gag Rule”*, U. UTAH S.J. QUINNEY C.L.: BIOLAWTODAY BLOG (Jan. 30, 2017), <http://www.law.utah.edu/president-trump-reinstates-the-mexico-city-policy-a-k-a-global-gag-rule/>.

31. 133 S. Ct. 2321 (2013).

32. *Id.* at 2326, 2332; Brown, *supra* note 30.

33. Brown, *supra* note 30; see also U.S. CONST. amend. I; *Agency for Int’l Dev.*, 133 S. Ct. at 2331–32.

been found to have standing under the Equal Protection Clause.<sup>34</sup> In view of recent developments concerning unconstitutional conditions on government funding, opponents of the Global Gag Rule might successfully demonstrate that the restrictive policy impermissibly targets abortion providers based on ideological grounds.<sup>35</sup>

This Comment will explore the implications of the Global Gag Rule's reinstatement and expansion in 2017.<sup>36</sup> Additionally, it will emphasize policy concerns surrounding the Global Gag Rule, and the significance of reproductive healthcare and family planning in the developing world.<sup>37</sup> This Comment will also discuss the doctrine of unconstitutional conditions on public funding that infringe First Amendment rights of speech and association.<sup>38</sup> Subsequently, this Comment will explore the applicability of the unconstitutional conditions doctrine in the context of funding restrictions, which aim to suppress speech on abortion, like the Global Gag Rule.<sup>39</sup>

## II. HISTORY OF THE MEXICO CITY POLICY—GLOBAL GAG RULE

### A. *Legislation Leading to the Global Gag Rule*

Before Ronald Reagan introduced the Mexico City Policy, President John F. Kennedy had signed into law the Foreign Assistance Act (“FAA”) in 1961, which authorized the President “to furnish assistance, on such terms and conditions as he may determine, for voluntary population planning.”<sup>40</sup> Congress was able to confer “such broad discretionary power to the [P]resident” based on “[t]he President’s constitutional authority to conduct

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34. *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 186, 197–98 (2d Cir. 2002); *see also* U.S. CONST. amend. XIV, § 1; Brown, *supra* note 30. The United States Court of Appeals for the Second Circuit held in *Center for Reproductive Law & Policy v. Bush* that the domestic NGO had standing to challenge the Mexico City Policy under a theory of *competitive advocate standing*. 304 F.3d 183 (2d Cir. 2002).

35. *See infra* Part IV.B; Brown, *supra* note 30.

36. *See* Memorandum on the Mexico City Policy, *supra* note 15.

37. *See infra* Part III; Brown, *supra* note 30; *Family Planning/Contraception*, WHO: MEDIA CTR., <http://www.who.int/mediacentre/factsheets/fs351/en/> (last visited Apr. 18, 2018).

38. *See infra* Part IV; U.S. CONST. amend. I; *Planned Parenthood Fed’n of Am., Inc. v. Agency for Int’l Dev.*, 915 F.2d 59, 62 (2d Cir. 1990).

39. *See infra* Part V; *Planned Parenthood of Greater Ohio v. Hodges*, 201 F. Supp. 3d 898, 900–01, 906 (S.D. Ohio 2016); Brown, *supra* note 30.

40. 22 U.S.C. § 2151b(b) (2012); Jones, *supra* note 17, at 192.



foreign affairs.”<sup>41</sup> The FAA’s enactment separated military and humanitarian assistance for the first time, and established USAID.<sup>42</sup>

In 1973, the same year in which the Supreme Court of the United States decided *Roe*, Congress enacted the Helms Amendment to the FAA.<sup>43</sup> The Amendment prohibits the use of United States foreign assistance funds for abortion services.<sup>44</sup> Pro-choice advocates denounced the Helms Amendment and similar restrictions as part of a wave of anti-abortion backlash to *Roe*.<sup>45</sup> In the years following *Roe*, anti-abortionists focused on imposing economic restrictions that would limit access to abortion.<sup>46</sup> Aware that they had failed to convince women and the rest of the pro-choice community that abortion was wrong, anti-abortionists began to devise new laws that targeted abortion providers and services.<sup>47</sup> Among these economic restrictions was the 1981 Biden Amendment to the FAA, which prohibited the use of foreign aid funding “for biomedical research related to [the] methods . . . or . . . performance of abortion[s].”<sup>48</sup>

Despite their gains in Congress, anti-abortionists were dismayed when President Reagan nominated Sandra Day O’Connor to the Supreme Court of the United States in 1981.<sup>49</sup> O’Connor, who was known as a moderate conservative, had once voted for a preliminary bill to *decriminalize abortion* during her time in the state senate.<sup>50</sup> As a result, President Reagan became the target of his pro-life supporters—an unwelcomed situation for the President since he planned to run for re-election in 1984.<sup>51</sup> “Jennifer Donnally, a historian who studies abortion rights,” explained that President Reagan introduced the Mexico City Policy in 1984, in part, to appease his

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41. Jones, *supra* note 17, at 192–93.

42. See *id.* at 193; *Foreign Assistance Act of 1961*, HUMANRIGHTS.GOV (July 1, 2003), <https://www.humanrights.gov/foreign-assistance-act-of-1961.html> [<http://web.archive.org/web/20170518002134/https://www.humanrights.gov/foreign-assistance-act-of-1961.html>].

43. 22 U.S.C. § 2151b(f); see also *Roe v. Wade*, 410 U.S. 113, 113 (1973).

44. 22 U.S.C. § 2151b(f); Jones, *supra* note 17, at 194.

45. *Helms Amendment Hurts Women Worldwide*, PLANNED PARENTHOOD ACTION FUND: COMMUNITIES, <http://www.plannedparenthoodaction.org/communities/planned-parenthood-global/helms-amendment-hurts-women-worldwide> (last visited Apr. 18, 2018); see also *Roe*, 410 U.S. 113.

46. Dunlap, *supra* note 7; see also *Roe*, 410 U.S. 113.

47. Dunlap, *supra* note 7.

48. KAISER FAMILY FOUND., *supra* note 16, at 5; see also 22 U.S.C. § 2151b(f)(3) (2012).

49. Leslie Bennetts, *Antiabortion Forces in Disarray Less than a Year After Victories in Election*, N.Y. TIMES, Sept. 22, 1981, at B5; Diamond, *supra* note 15; Steven R. Weisman, *Reagan Nominating Woman, an Arizona Appeals Judge, to Serve on Supreme Court*, N.Y. TIMES, July 8, 1981, at A1.

50. Diamond, *supra* note 15; see also Weisman, *supra* note 49.

51. Diamond, *supra* note 15.

pro-life supporters.<sup>52</sup> Alan Keyes, one of President Reagan's advisors, helped drafting the Policy and presented it at the International Conference on Population in Mexico City.<sup>53</sup>

After its introduction in 1984, the Mexico City Policy remained in effect until 1993, when President Bill Clinton rescinded it during his first term in office.<sup>54</sup> The Policy was legislatively reinstated between 2000 and 2001, during President Clinton's second term.<sup>55</sup> Congress was able to institute "a modified version of the [P]olicy . . . as part of a broader arrangement to pay the U.S. debt to the United Nations" during President Clinton's last year in office.<sup>56</sup> "The [P]olicy was reinstated [through executive order] by President George W. Bush in 2001," and it remained in place during his two terms in office.<sup>57</sup> In 2009, President Obama rescinded the Policy.<sup>58</sup> On January 23, 2017, President Trump reinstated the Policy via presidential memorandum, ordering the Secretary of State to reinstate the 2001 Presidential Memorandum on the Mexico City Policy.<sup>59</sup> President Trump further directed the State Department and the Department of Health to extend the Policy's requirements to all "global health assistance furnished by all departments or agencies."<sup>60</sup>

On May 15, 2017, the Department of State issued a press release statement, announcing that President Trump's Secretary of State, Rex Tillerson, had approved a plan called "Protecting Life in Global Health Assistance" as a guideline for the Mexico City Policy implementation.<sup>61</sup> Like in the past, the Policy restricts foreign aid recipients from using any funds, including non-U.S. funds.<sup>62</sup> The Policy guidelines apply to foreign NGOs, recipients of foreign aid funding, "including those to which a U.S. NGO makes a sub-award with such assistance funds."<sup>63</sup> The implementation plan further indicates that, "*global health assistance* includes funding for

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52. *Id.*

53. *Id.*; AlanKeyesTv, *Alan Keyes Values Voter Debate 9/17/07 Mexico City Policy* at 1:33, YOUTUBE (Nov. 18, 2010), <http://www.youtube.com/watch?v=YOa2VmR8n78>.

54. KAISER FAMILY FOUND., *supra* note 16, at 2.

55. *See id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Memorandum on the Mexico City Policy, *supra* note 15.

60. *Id.*

61. Press Release, U.S. Dep't of State, *supra* note 29.

62. *Id.*; KAISER FAMILY FOUND., *supra* note 16, at 1. Before the Policy's introduction, "NGOs [were allowed to] use non-U.S. funds to engage in [abortion services and advocacy, but were required to] maintain[] segregated accounts." KAISER FAMILY FOUND., *supra* note 16, at 2.

63. Press Release, U.S. Dep't of State, *supra* note 29.

international health programs, such as those for HIV/AIDS, maternal and child health, malaria, global health security, and family planning and reproductive health.”<sup>64</sup>

The State Department addressed the Policy’s expansive nature in the same press release, indicating that “the [d]epartment will undertake a thorough and comprehensive review of the effectiveness and impact of the [P]olicy’s application over the next six months,” adding that “[n]ewly covered programs [like] PEPFAR . . . [would] be given special attention under [the] review.”<sup>65</sup> However, critics point out that there are no indications that the Trump Administration has studied the impact of the Policy’s expansion—both on women’s health and the prevention of infectious diseases, such as HIV or Zika.<sup>66</sup>

At this stage, it is hard to predict the exact implications of the Mexico City Policy, but estimates and analysis presented by global health organizations reveal troublesome information on the possible effects of the expanded Policy.<sup>67</sup> Moreover, comparative data obtained between 2001 and 2008 suggests that the Policy’s implementation is not only harmful, but is counterproductive in reducing abortion and preventing maternal deaths.<sup>68</sup>

#### B. *Consequences of the Global Gag Rule*

Proponents of the Mexico City Policy claimed that, when in force, the rule reduced the number of abortions performed around the world.<sup>69</sup> But a 2011 study conducted by Stanford University’s Department of Medicine indicated that the Mexico City Policy is associated with increased rates of abortions in Sub-Saharan Africa.<sup>70</sup> The study showed that, “in high exposure

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64. *Id.*

65. *Id.*

66. Redden, *supra* note 23.

67. JEN KATES & KELLIE MOSS, KAISER FAMILY FOUND., WHAT IS THE SCOPE OF THE MEXICO CITY POLICY: ASSESSING ABORTION LAWS IN COUNTRIES THAT RECEIVE U.S. GLOBAL HEALTH ASSISTANCE 1–3 (2017), <http://files.kff.org/attachment/Data-Note-What-is-the-Scope-of-the-Mexico-City-Policy>; Kelli Rogers, *In Colombia, ‘Global Gag Rule’ Punishes Conflict-Affected Populations*, DEVEX: NEWS (June 6, 2017), <http://www.devex.com/news/in-colombia-global-gag-rule-punishes-conflict-affected-populations-90393>.

68. Eran Bendavid et al., *United States Aid Policy and Induced Abortion in Sub-Saharan Africa*, 89 BULL. WORLD HEALTH ORG. 873, 873, 876–78 (2011); *see also The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health: Hearing Before the H.R. Comm. on Foreign Affairs*, 110th Cong. 16–17, 32 (2007).

69. *See The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health: Hearing Before the H.R. Comm. on Foreign Affairs*, *supra* note 68, at 3.

70. Bendavid et al., *supra* note 68, at 877.

countries, abortion rates began to rise noticeably only after the Mexico City Policy was reinstated in 2001 [by President Bush] and the increase became more pronounced from 2002 onward.”<sup>71</sup> Reduced access to contraception in highly exposed countries might explain the study’s paradoxical findings.<sup>72</sup> Many women in Sub-Saharan Africa entirely depend on NGOs for contraception and reproductive healthcare.<sup>73</sup> After the Policy’s reinstatement in 2001, NGOs that refused to follow the Policy were forced to reduce personnel or shut down entirely, resulting in limited access to contraception, which in turn increased the number of unintended pregnancies and abortions.<sup>74</sup> Stanford University researchers concluded that, despite the fact that abortion is associated with multiple factors, their findings suggested that the Mexico City Policy could have “unrecognized—and unintended—health consequences.”<sup>75</sup>

In addition to quantitative data presented by Stanford University, there is anecdotal evidence on the rule’s impact on services provided by NGOs that have foregone funding in the past.<sup>76</sup> In a 2007 congressional hearing before the Committee on Foreign Affairs, the former director for Planned Parenthood Association of Ghana, Joana Nerquaye-Tetteh, Ph.D., testified that by refusing to sign the Mexico City Policy, the organization had lost \$600,000—almost a third of its budget.<sup>77</sup> The Ghanaian International Planned Parental Federation (“IPPF”) branch was forced to lay off more than half of their 192 staff members and over a thousand community-based agents.<sup>78</sup> Community agents, she explained, were the “backbone of [their] family planning outreach [program] for rural Ghanaians.”<sup>79</sup> In addition to human resources, the branch *lost U.S.-donated contraceptive[s]*, and in less

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71. *Id.*

72. *See id.* at 878.

73. *See id.* at 877; Perry & Morlin-Yron, *supra* note 23 (explaining that “[w]omen will walk for miles” to find contraceptive services).

74. *See The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health: Hearing Before the H.R. Comm. on Foreign Affairs, supra* note 68, at 1, 32–33.

75. Bendavid et al., *supra* note 68, at 878.

76. KAISER FAMILY FOUND., *supra* note 16, at 5–6.

77. *The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health: Hearing Before the H.R. Comm. on Foreign Affairs, supra* note 68, at 31–32.

78. *Id.* at 36 (quoting JULIE SOLO ET AL., GHANA CASE STUDY: ‘GIVE THEM THE POWER’ 23 (2005), [http://www.acquireproject.org/fileadmin/user-upload/ACQUIRE/Ghana\\_case\\_study.pdf](http://www.acquireproject.org/fileadmin/user-upload/ACQUIRE/Ghana_case_study.pdf)).

79. *Id.* at 32.

than one year, “condom distribution fell by [forty] percent.”<sup>80</sup> By 2004, 38,000 Ghanaian women had lost access to modern contraception.<sup>81</sup>

### III. THE GLOBAL GAG RULE IN 2017

#### A. *The Policy Terms*

President Trump’s Executive Order will apply to funds appropriated directly to USAID, the Department of State, and, for the first time, the Department of Defense.<sup>82</sup> The restrictions apply to three types of funding agreements: “[G]rants, cooperative agreements, and [for the first time], contracts.”<sup>83</sup> In addition to being restricted from promoting or providing abortion services, recipient NGOs are restricted from “[I]obbying a foreign government to legalize . . . abortion as a method of family planning,” or from “[c]onducting a public information campaign in foreign countries regarding the benefits . . . of abortion.”<sup>84</sup>

However, the Policy makes several exceptions.<sup>85</sup> NGOs can provide information or make a referral on abortion when the mother’s life is in danger, or the pregnancy is the result of incest or rape.<sup>86</sup> Under the Policy, NGOs may also “passively respond[] to . . . question[s] regarding where a safe, legal abortion may be obtained” once the mother clearly states she has decided to have a legal abortion.<sup>87</sup> Finally, NGOs are not restricted from providing post-abortion care to women who have suffered injury or illness due to a legal or illegal abortion.<sup>88</sup>

#### B. *Potential Implications in 2017*

In a recent study on the scope of the Mexico City Policy, the Kaiser Family Foundation concluded that from sixty-four countries “that received U.S. bilateral global health assistance in . . . 2016, [thirty-seven of those countries] allow for legal abortion in at least one case not permissible by the

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80. *Id.*

81. *Id.*

82. See Press Release, U.S. Dep’t of State, *supra* note 29.

83. *Id.*

84. USAID, STANDARD PROVISIONS FOR NON-U.S. NONGOVERNMENTAL ORGANIZATIONS 87 (2017), <https://www.usaid.gov/sites/default/files/documents/1868/303mab.pdf>.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

[Mexico City Policy].”<sup>89</sup> In other words, NGOs providing assistance in those thirty-seven countries will be restricted from providing abortion related services in cases that are still permissible under the country’s laws.<sup>90</sup> “[T]hese [thirty-seven] countries account[] for 53% of bilateral global health assistance,” with the majority of countries located Africa and the second largest group in South and Central Asia.<sup>91</sup> The remaining twenty-seven countries receiving bilateral assistance are not expected to be as heavily impacted given that abortion is illegal beyond the exceptions listed under the Mexico City Policy—i.e. rape, incest, or when the mother’s life is in danger.<sup>92</sup> Altogether, the sixty-four countries accounted for \$6.1 billion in foreign assistance funding for the fiscal year of 2016.<sup>93</sup>

NGOs operating in countries where abortion is not legal, beyond the exceptions listed under the Policy, will not be forced to choose between restricting permissible abortion services or foregoing United States funding.<sup>94</sup> Nonetheless, all NGOs receiving federal funding are banned from lobbying for the decriminalization of abortion or from conducting public campaigns on the benefits of abortion as a method of family planning.<sup>95</sup> Opponents of the Global Gag Rule fear that banning NGOs from participating in advocacy activities will thwart democratic processes in countries where abortion is strictly restricted and undermine efforts to repeal *draconian abortion laws* that harm girls and women.<sup>96</sup> Countries with extreme poverty and violence, like El Salvador and Honduras, criminalize abortion in all circumstances, including cases of child rape and when the mother’s life is in danger.<sup>97</sup> Activists working in Latin America fear that the

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89. KATES & MOSS, *supra* note 67, at 1.

90. *Id.*

91. *Id.* at 1, 3.

92. *Id.* at 1–3.

93. *Id.* at 3.

94. *See* KATES & MOSS, *supra* note 67, at 3–4.

95. *Id.* at 2, 4.

96. *See* Carter Sherman, *Abortion Isn’t Going to Be Decriminalized in Honduras Anytime Soon*, VICE NEWS (May 5, 2017), [http://news.vice.com/en\\_us/article/4348kd/abortion-isnt-going-to-be-decriminalized-in-honduras-anytime-soon](http://news.vice.com/en_us/article/4348kd/abortion-isnt-going-to-be-decriminalized-in-honduras-anytime-soon); Jonathan Watts, ‘Global Gag Rule’ Could Have Dire Impact in Latin America, *Activists Warn*, GUARDIAN US (Jan. 26, 2017, 4:00 AM), <http://www.theguardian.com/global-development/2017/jan/26/global-gag-rule-latin-america-abortion-contraception>.

97. *See* Sherman, *supra* note 96; Watts, *supra* note 96. Violence against women is so rampant in Honduras that, “[b]etween 2005 and 2013, . . . violent female deaths rose by . . . 260[%];” and in 2013, “[a] report of sexual assault was filed an average of every three hours.” Sherman, *supra* note 96.

Global Gag Rule “will have a chilling impact on . . . work done by [NGOs and Latin American groups] that advocate [for] safe abortion.”<sup>98</sup>

C. *The Importance of Comprehensive Reproductive Healthcare in 2017*

The Bill and Melinda Gates Foundation reported, in early 2017, that “[f]or the first time in history, more than 300 million women in developing countries are using modern methods of contraception.”<sup>99</sup> Additionally, data provided by the Guttmacher Institute indicated a gradual decline in abortion rates between 2010 and 2014.<sup>100</sup> However, the lowest abortion rates were observed in developed nations.<sup>101</sup> In contrast, abortion rates “increased in developing regions from [thirty-nine] million to [fifty] million as the reproductive age population grew at a similar pace.”<sup>102</sup>

According to the World Health Organization (“WHO”), “[t]he unmet need for contraception remains too high, [and] [t]his inequity is fueled by both a growing population, and a shortage of family planning services.”<sup>103</sup> “By 2020, there will be more women of reproductive age than ever before” and “there are still more than 225 million women in the developing world who [do not wish] to get pregnant but [do not] have access to contracepti[on].”<sup>104</sup> The WHO has further indicated that “[i]n Africa, 24.2% of women of reproductive age have an unmet need for . . . contraception.”<sup>105</sup> In South Asia, “contraceptives are used by only a third of . . . women,” and according to a “recent youth survey [conducted] in the Indian state of Uttar Pradesh . . . 64% of married teenage girls wanted to postpone their first pregnancy, but only 9% practiced a modern method of contraception.”<sup>106</sup> Critics of the Global Gag Rule condemn the administration’s disregard for these troubling statistics, and fear the Global Gag Rule will disrupt current

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98. Watts, *supra* note 96.

99. BILL & MELINDA GATES, OUR 2017 ANNUAL LETTER: WARREN BUFFETT’S BEST INVESTMENT 8 (Feb. 14, 2017), <http://www.gatesnotes.com/media/AL2017/PDFs/2017AnnualLetter-EN.pdf>.

100. GUTTMACHER INST., INDUCED ABORTION WORLDWIDE (May 2016), [http://www.guttmacher.org/sites/default/files/factsheet/fb\\_iaw.pdf](http://www.guttmacher.org/sites/default/files/factsheet/fb_iaw.pdf) [[http://www.web.archive.org/web/20160813211647/https://www.guttmacher.org/sites/default/files/factsheet/fb\\_iaw.pdf](http://www.web.archive.org/web/20160813211647/https://www.guttmacher.org/sites/default/files/factsheet/fb_iaw.pdf)].

101. *Id.*

102. *Id.*

103. *Family Planning/Contraception*, *supra* note 37.

104. GATES & GATES, *supra* note 99, at 9; *What We Do*, MARIE STOPES INT’L, <http://www.mariestopes.org/what-we-do/> (last visited Apr. 18, 2018).

105. *Family Planning/Contraception*, *supra* note 37.

106. GATES & GATES, *supra* note 99, at 9.

and future efforts to provide better access to contraception in the developing world.<sup>107</sup>

Additionally, the Global Gag Rule could negatively impact efforts to reduce maternal mortality by restricting access to safe abortion in developing countries.<sup>108</sup> The Kaiser Family Foundation reported that “[e]ach year, an estimated 303,000 women die from complications during pregnancy and childbirth,” most of them in the developing world.<sup>109</sup> As of January 2018, the leading cause of death for fifteen to nineteen-year-old girls are complications during pregnancy and childbirth—and babies born to adolescent mothers have higher rates of infant mortality.<sup>110</sup> Besides complications during pregnancy and childbirth, thousands of women—most of them in the developing world—die from unsafe abortion practices each year.<sup>111</sup> According to the WHO, every year, 21.6 million women have unsafe abortions, and 47,000 women die from complications.<sup>112</sup> Restrictive laws on abortion will not stop women from obtaining an abortion; in their desperation, women will turn to unsafe and clandestine procedures to end their pregnancies.<sup>113</sup>

Protecting women’s access to reproductive healthcare is also vital to human development.<sup>114</sup> A 2016 study published by the United Nations Population Fund revealed that today, most ten-year-old girls live in a developing nation.<sup>115</sup> Of ten-year-old girls, almost nine out of ten of them, or 89%, live in the developing world—half of them in Asia and the Pacific alone.<sup>116</sup> Girls living in developing countries are at a statistical disadvantage in relation to their brothers; they “are less likely to stay in school, more likely to be engaged in child [labor], more likely to be married before they turn [eighteen, and] more likely to experience intimate partner violence.”<sup>117</sup>

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107. See Stars, *supra* note 19, at 486.

108. See Perry & Morlin-Yron, *supra* note 23.

109. KAISER FAM. FOUND., THE U.S. GOVERNMENT AND INTERNATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH EFFORTS 1 (Feb. 2017), [files.kff.org/attachment/fact-sheet-the-u-s-government-and-international-family-planning-and-reproductive-health](http://files.kff.org/attachment/fact-sheet-the-u-s-government-and-international-family-planning-and-reproductive-health).

110. *Adolescent Pregnancy*, WHO: MEDIA CTR., <http://www.who.int/mediacentre/factsheets/fs364/en/> (last updated Jan. 2018).

111. See *Preventing Unsafe Abortion*, WHO: SEXUAL & REPROD. HEALTH, [http://www.who.int/reproductruehealth/topics/unsafe\\_abortion/magnitude/en](http://www.who.int/reproductruehealth/topics/unsafe_abortion/magnitude/en) (last visited Apr. 18, 2018).

112. *Id.*

113. GUTTMACHER INST., *supra* note 100.

114. See DAVID E. BLOOM ET AL., THE STATE OF WORLD POPULATION 2016, at 8–9, U.N. Sales No. E.16.III.H.1 (2016).

115. *Id.* at 16.

116. *Id.*

117. *Id.* at 26.



Gender inequality extends far beyond pay gaps; it has life-long effects on girls' lives and negatively impacts communities.<sup>118</sup> In short, *poverty is sexist*.<sup>119</sup> It is not a secret that societies that empower women reap the socio-economic benefits.<sup>120</sup> Studies show a correlation between gender equality and economic growth.<sup>121</sup> Some of the world's wealthiest nations, such as Denmark, Sweden, and Norway rank high under gender equality indexes; whereas, poor countries such as Niger, Somalia, and Mali rank last when it comes to gender equality and human development.<sup>122</sup>

#### D. *Organizations Foregoing Funding*

Global organizations like IPPF and Marie Stopes International ("MSI") confirmed they would forego United States funding.<sup>123</sup> Both organizations support abortion rights and believe the rule goes against their core principles.<sup>124</sup> IPPF further added that the Policy undermines human rights by restricting, or taking away, people's right to choose.<sup>125</sup> MSI expressed that it is not possible to remove safe abortion from its services, as it would only *expose women* to other dangers.<sup>126</sup>

Given that USAID is one of the largest donors, IPPF and MSI face large budget cuts.<sup>127</sup> IPPF reported that the group stands to lose \$100 million in annual funding for refusing to sign the Policy.<sup>128</sup> From those \$100 million, \$42 million would have been used for HIV programs to provide treatment to 275,000 women living with the virus.<sup>129</sup> IPPF provides 300

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118. *See id.* at 26–27.

119. GATES & GATES, *supra* note 99, at 10.

120. *Id.* at 10–12.

121. *See* SELIM JAHAN, UNDP, HUMAN DEVELOPMENT REPORT 2016: HUMAN DEVELOPMENT FOR EVERYONE, at 214–17, U.N. Sales No. E.16.III.B.1 (2016); GATES & GATES, *supra* note 99, at 10.

122. JAHAN, *supra* note 121, at 214, 216–17; *see also* GATES & GATES, *supra* note 99, at 10.

123. Redden, *supra* note 23; Alexandra Sifferlin, *Here's What the Mexico City Policy Means for Women*, TIME: HEALTH (Jan. 23, 2017), <http://www.time.com/4644042/mexico-city-policy-abortion-womens-health/>.

124. *See* Sifferlin, *supra* note 123; *Why We Will Not Sign the Global Gag Rule*, INT'L PLANNED PARENTHOOD FED'N: NEWS (Jan. 23, 2017), <http://www.ippf.org/news/why-we-will-not-sign-global-gag-rule>.

125. *Why We Will Not Sign the Global Gag Rule*, *supra* note 124.

126. Perry & Morlin-Yron, *supra* note 23.

127. *See* Sifferlin, *supra* note 123.

128. *Why We Will Not Sign the Global Gag Rule*, *supra* note 124.

129. Jessica Abrahams, *Europe Raises at Least \$32.2M to Plug 'Global Gag Rule' Shortfall*, DEVEX: NEWS (Feb. 21, 2017), <http://www.devex.com/news/europe-raises-at-least-32-2m-to-plug-global-gag-rule-shortfall-89659>; *The Human Cost of the Global Gag Rule*, INT'L PLANNED PARENTHOOD FED'N: NEWS (Feb. 9, 2017),

services per minute every day, “including [seventy] million contraceptive services every year.”<sup>130</sup> Additionally, IPPF estimates that U.S. “funding could have prevented 20,000 maternal deaths, 4.8 million unintended pregnancies, [and] 1.7 million unsafe abortions.”<sup>131</sup> MSI, which provides family planning services in thirty-seven countries, stands to lose \$30 million in funding.<sup>132</sup> The organization has estimated that, without their United States funding, 1.6 million women will lose access to contraception—which could lead to “6.5 million unintended pregnancies, . . . 2.1 million unsafe abortions, and 21,700 maternal deaths.”<sup>133</sup> The Dutch government launched the *She Decides* project with the objective of raising funds for organizations like MSI and IPPF.<sup>134</sup> As of February 2017, the project had raised thirty million euros from the \$600 million needed each year to make up for lost funding.<sup>135</sup>

#### IV. CHALLENGING THE GLOBAL GAG RULE

##### A. *PPFA v. USAID*

Domestic NGOs have not failed to challenge the Global Gag Rule in court since its introduction.<sup>136</sup> One of the first decisions concerning the constitutionality of the Mexico City Policy was *Planned Parenthood Federation of America, Inc. v. Agency for International Development*,<sup>137</sup> decided by the United States Courts of Appeals for the Second Circuit in 1990.<sup>138</sup> According to Planned Parenthood Federation of America (“PPFA”), the Gag Rule “impose[d] unconstitutional conditions on a[] . . . government benefit by requiring it to enforce restrictions on speech in order to participate as a conduit for . . . funds to . . . NGOs.”<sup>139</sup> Furthermore, PPFA argued that the Policy interfered with its constitutional right to association by granting a financial incentive to foreign NGOs to not associate with it.<sup>140</sup> The Second

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<http://www.ippf.org/news/human-cost-global-gag-rule>; *Why We Will Not Sign the Global Gag Rule*, *supra* note 124.

130. *Why We Will Not Sign the Global Gag Rule*, *supra* note 124.

131. *The Human Cost of the Global Gag Rule*, *supra* note 129.

132. Abrahams, *supra* note 129.

133. Sifferlin, *supra* note 123.

134. Dreifus, *supra* note 22.

135. *Id.*

136. See Priscilla Smith et al., *The Global Gag Rule: A Violation of the Right to Free Speech and Democratic Participation*, HUM. RTS., Summer 2002, at 12, 14.

137. 915 F.2d 59 (2d Cir. 1990).

138. *Id.* at 59.

139. *Id.* at 62.

140. *Id.*

Circuit dismissed PPGA's claim and affirmed the district court's decision, in that the Mexico City Policy conditions on funding foreign NGOs constituted "the least restrictive means of implementing a nonjusticiable foreign policy decision."<sup>141</sup> Furthermore, the Policy "advanced a substantial governmental foreign policy interest" in preventing abortions, and "incidental intrusion on the rights of domestic NGOs [were] 'no greater than is essential to the furtherance of'" that Policy.<sup>142</sup> The Second Circuit reasoned that foreign NGOs' refusal to associate with Planned Parenthood was "the result of choices made by . . . NGOs to take [USAID's] money rather than engage in [non-USAID] . . . efforts with" Planned Parenthood and was, therefore, incidental to the Policy.<sup>143</sup> The court noted that the government's refusal to subsidize abortions did not constitute an unconstitutional penalty imposed on women who chose to have an abortion and was, therefore, permissible—as established by the Supreme Court of the United States in *Harris v. McRae*,<sup>144</sup> which had upheld the constitutionality of the Hyde Amendment.<sup>145</sup>

#### B. *CRLP v. USAID*

The Policy was challenged once more in 2002 by the Center for Reproductive Law and Policy ("CRLP") on grounds that foreign NGOs, which had agreed to follow the Policy, were chilled from interacting and communicating with domestic abortion rights groups, therefore depriving CRLP from its constitutional rights to speech and association.<sup>146</sup> CRLP argued that the Policy's "restrictions violate[d] the Equal Protection Clause . . . by preventing [it] from competing on *equal footing* with domestic anti-abortion groups."<sup>147</sup> According to CRLP, the Policy conditions infringed the Due Process Clause by failing to clearly instruct which activities were restricted, therefore allowing arbitrary enforcement of the Policy.<sup>148</sup>

"CRLP [further] argued . . . that the district court [had] wrongly [interpreted] the issues of injury in fact and causation" by relying on *Planned Parenthood Federation of America, Inc.*—a case that, according to CRLP,

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141. *Id.* at 60–61.

142. *Planned Parenthood Fed'n of Am., Inc.*, 915 F.2d at 63 (quoting *Planned Parenthood Fed'n of Am. Inc. v. Agency for Int'l Dev.*, No. 87 CIV. 0248 (JMW), 1990 WL 26306, at \*8 (S.D.N.Y. Mar. 7, 1990)).

143. *Id.* at 64.

144. 448 U.S. 297 (1980).

145. *Planned Parenthood Fed'n of Am., Inc.*, 915 F.2d at 65; *see also Harris*, 448 U.S. at 317.

146. *Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 186–87, 189 (2d Cir. 2002).

147. *Id.* at 188.

148. *Id.* at 196.

did not resemble the facts at hand.<sup>149</sup> Justice Sonia Sotomayor—who authored the majority decision—explained that although *Planned Parenthood Federation of America, Inc.* was controlling, it did not follow that the decision had “answer[ed] the question of causation [in] respect to constitutional standing.”<sup>150</sup> Moreover, in between the time *Planned Parenthood Federation of America, Inc.* was decided and CRLP’s action, the Supreme Court of the United States had criticized some courts’ practice to “proceed[] directly to the merits of a case . . . assuming *arguendo* that the plaintiffs ha[d] constitutional standing” to sue.<sup>151</sup> However, the Court explained an exception would be allowed when the merits were *foreordained* by another case to the extent that answering the jurisdictional question on standing would not affect the outcome.<sup>152</sup> Following this line of reasoning, the Second Circuit refused to answer whether CRLP had constitutional standing in relation to its First Amendment claims.<sup>153</sup> The circuit court explained that its decision in *Planned Parenthood Federation of America, Inc.* *foreordained* CRLP’s First Amendment claims on the merits, and answering the question of Article III standing would make no difference.<sup>154</sup>

Additionally, the Second Circuit dismissed CRLP’s due process claim, arguing that CRLP lacked standing “[p]ursuant to the doctrine of prudential standing.”<sup>155</sup> The doctrine prohibits a litigant from raising another person’s legal rights and “require[s] that a plaintiff’s complaint fall within the zone of interests protected by the [legal provision] invoked.”<sup>156</sup> CRLP’s claim that the Policy’s lack of clarity encouraged NGOs to arbitrarily enforce the rule against CRLP was derivative of the NGOs “due process-type harm, and . . . albeit an unactionable one—concern[ed] First Amendment interests.”<sup>157</sup> CRLP’s derivative harm did not fall within the zone of interests

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149. Smith et al., *supra* note 136, at 14; see also *Ctr. for Reprod. Law & Policy*, 304 F.3d at 190–91.

150. *Ctr. for Reprod. Law & Policy*, 304 F.3d at 186, 190, 192. When this opinion was written, Justice Sonia Sotomayor was on the Second Circuit; since she is on the Supreme Court when this Comment was written, she will be distinguished throughout as Justice Sonia Sotomayor. See *id.*

151. *Id.* at 193 (citing *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93–94 (1998)); *Planned Parenthood Fed’n of Am., Inc. v. Agency for Int’l Dev.*, 915 F.2d 59, 62–63 (2d Cir. 1990).

152. *Ctr. for Reprod. Law & Policy*, 304 F.3d at 194 (quoting *Steel Co.*, 523 U.S. at 98).

153. *Id.* at 195; see also U.S. CONST. amend. I.

154. *Ctr. for Reprod. Law & Policy*, 304 F.3d at 194 (quoting *Steel Co.*, 523 U.S. at 98); see also U.S. CONST. art. III § 1; U.S. CONST. amend. I.

155. *Ctr. for Reprod. Law & Policy*, 304 F.3d at 196.

156. *Id.* (quoting *Crist v. Comm’n on Presidential Debates*, 262 F.3d 193, 195 (2d Cir. 2001) (per curiam)).

157. *Id.*; see also U.S. CONST. amend. I.

protected by the Due Process Clause—thus, lacking prudential standing.<sup>158</sup> Justice Sotomayor further wrote, “[p]laintiffs cannot make their First Amendment claims actionable merely by attaching them to a third party’s due process interests.”<sup>159</sup>

The Second Circuit conceded, however, that CRLP had constitutional standing in relation to its *Equal Protection* claim, based on a theory the court referred to as *competitive advocate standing*.<sup>160</sup> By choosing to only fund anti-abortion groups, the government had “create[d] an uneven playing field” for competing advocates participating in the same arena.<sup>161</sup> The government’s conditions on foreign funding were viewpoint-discriminatory and denied CRLP equal protection of the law.<sup>162</sup> Notwithstanding CRLP’s standing on the issue, the Second Circuit held the Equal Protection claim meritless, asserting that the Policy’s discriminatory regulations were permissible because the government was *free to favor* an anti-abortion position as established under *Rust v. Sullivan*.<sup>163</sup> In *Rust*, the Supreme Court of the United States held that prohibiting Title X fund-recipients from engaging in abortion counseling or referral did not violate recipients’ constitutional rights by favoring one position over another—the government had simply made a *funding decision* when allocating funds to one group at the exclusion of another.<sup>164</sup>

### C. *Rust v. Sullivan*

In the 1991 decision of *Rust*, the Supreme Court of the United States emphasized that “a basic difference [exists] between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy.”<sup>165</sup> According to the Court, the distinction was between conditions that impermissibly regulated activity outside the project’s scope, and conditions that were “designed to ensure . . . the limits

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158. *Ctr. for Reprod. Law & Policy*, 304 F.3d at 196; *see also* U.S. CONST. amend. XIV, § 1.

159. *Ctr. for Reprod. Law & Policy*, 304 F.3d at 196; *see also* U.S. CONST. amend. I.

160. *Ctr. for Reprod. Law & Policy*, 304 F.3d at 197; (quoting *U.S. Catholic Conference v. Baker*, 885 F.2d 1020, 1028–29 (2d Cir. 1984)).

161. *Id.* (quoting *Baker*, 885 F.2d at 1029).

162. *See id.*; Chase Ruffin, Note, *You Don’t Have to, but It’s in Your Best Interest: Requiring Express Ideological Statements as Conditions on Federal Funding*, 29 GA. ST. U.L. REV. 1129, 1138 (2013).

163. 500 U.S. 173 (1991); *Ctr. for Reprod. Law & Policy*, 304 F.3d at 197–98.

164. *Rust*, 500 U.S. at 198, 210–11; *see also* Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, sec. 6(c), § 1008.84 Stat. 1506, 1508 (codified as amended at 42 U.S.C. §§ 300 to 300a-6 (2012)).

165. *Rust*, 500 U.S. at 193 (quoting *Maier v. Roe*, 432 U.S. 464, 475 (1977)).

of the federal program [were] observed.”<sup>166</sup> Based on this distinction, the government could prohibit the use of family planning funds for pre-natal services because such services fell outside the program’s scope.<sup>167</sup> Accordingly, the government could prohibit the appropriation of funds to programs “where abortion [was] a method of family planning.”<sup>168</sup> The Court emphasized that the regulations governed the Title X *project*, and not the Title X *grantee*.<sup>169</sup> Grantees could still exercise their constitutional rights of free speech and association through programs “separate and independent from [Title X] project[s].”<sup>170</sup>

However, “[s]cholars have criticized [this] penalty/nonsubsidy dichotomy” due to its arbitrary nature.<sup>171</sup> Redefining a viewpoint-discriminatory policy as a funding decision does not change the fact that protected rights have been encroached upon.<sup>172</sup> Furthermore, “constitutional rights can [still] be impermissibly burdened even if” the funding restriction does not constitute a penalty of coercive nature.<sup>173</sup> Justice Blackmun strongly disagreed with the majority’s opinion in *Rust*, arguing that “[t]he regulations [were] clearly viewpoint based,” and “[w]hile suppressing speech favorable to abortion with one hand, the [government] compels anti-abortion speech with the other.”<sup>174</sup> The government had plainly targeted a particular viewpoint “[b]y refusing to fund those family planning projects that advocate abortion *because* they advocate abortion.”<sup>175</sup> Moreover, disguising a viewpoint-discriminatory policy as a funding decision allowed the government to attach an unconstitutional condition to the award of public funds.<sup>176</sup> The restrictions on Title X funds implicated core constitutional rights—primarily rights of speech and a woman’s right to choose whether to

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166. *Rust*, 500 U.S. at 193.

167. *Id.* at 193–94.

168. *Id.* at 193.

169. *Id.* at 196; *see also* sec. 6(c), § 1008, 84 Stat. at 1508.

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

171. Ruffin, *supra* note 162, at 1136–37.

172. *See* Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc., 133 S. Ct. 2321, 2328 (2013); Ruffin, *supra* note 162, at 1151. “If the Court continues to recast viewpoint-discriminatory regulations . . . as permissible selective funding decisions subject to only minimal scrutiny, the government’s viewpoint will have a stronger presence in the marketplace in contravention of the goals of the First Amendment.” Ruffin, *supra* note 162, at 1151; *see also* Agency for Int’l Dev., 133 S. Ct. at 2328.

173. Agency for Int’l Dev., 133 S. Ct. at 2328; Ruffin, *supra* note 162, at 1137.

174. *Rust*, 500 U.S. at 209 (Blackmun, J., dissenting).

175. *Id.* at 210 (Blackmun, J., dissenting).

176. *Id.* at 205 (Blackmun, J., dissenting).

terminate her pregnancy.<sup>177</sup> According to Justice Blackmun, in its haste to further restrict women’s reproductive rights, the majority had disregarded established principals of law and *contorted previous decisions* by the Court to arrive at its *preordained result*.<sup>178</sup>

## 1. Constitutional Conditions Post-Rust

### a. Eighth Circuit

Since *Rust*, several federal courts have upheld funding conditions that target abortion providers by recasting the restrictions as permissible funding decisions.<sup>179</sup> In 1999, the United States Courts of Appeals for the Eighth Circuit held that a Missouri statute preventing abortion service providers from receiving family planning funds did not impose an unconstitutional condition if the statute was construed as to allow grantees to “establish an independent affiliate to provide abortion services outside the government program.”<sup>180</sup> According to the circuit court, the Missouri statute was *facially ambiguous* by failing to expressly prohibit grantees from affiliating with an independent abortion provider.<sup>181</sup> “Under this construction . . . grantees [could] exercise their constitutionally protected rights through [separate] affiliates.”<sup>182</sup> Relying on the Supreme Court’s language in *Rust*, the circuit court explained that, “[l]egislation that simply dictates the proper scope of government-funded programs is constitutional, while legislation that restricts protected grantee activities outside government programs is unconstitutional.”<sup>183</sup>

### b. Tenth Circuit

In 2009, the United States District Court for the Northern District of Oklahoma held in *Hill v. Kemp*<sup>184</sup> that an Oklahoma statute that offered

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177. *Id.* at 205–06 (Blackmun, J., dissenting); see also Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, sec. 6(c), § 1008, 84 Stat. 1504, 1508 (codified as amended at 42 U.S.C. §§ 300 to 300a-6 (1970)).

178. *Rust*, 500 U.S. at 219 (Blackmun, J., dissenting).

179. Deborah F. Buckman, Annotation, *Validity, Construction, and Application of State Statutes Limiting or Conditioning Receipt of Government Funds by Abortion Providers*, 26 A.L.R. Fed. 7th Art. 9, §§ 1–2 (2017); see also *Rust*, 500 U.S. at 196.

180. *Planned Parenthood of Mid-Missouri & E. Kan., Inc. v. Dempsey*, 167 F.3d 458, 463–64 (8th Cir. 1999) (citing *Rust*, 500 U.S. at 198).

181. *Id.* at 463.

182. *Id.*

183. *Id.* at 462 (citing *Rust*, 500 U.S. at 196).

184. 645 F. Supp. 2d 992 (N.D. Okla. 2009).

motorists specialty license plates featuring pro-life statements—and excluded organizations that provided abortion services from obtaining any of the funds collected—was constitutional based on the government’s authority to favor one position over another, as established under *Rust*.<sup>185</sup> Additionally, the statute allowed the affected NGOs to create a separate affiliate that did not engage in abortion services to apply for the collected funding.<sup>186</sup> According to the court, this arrangement provided an adequate alternative to protect the NGOs’ constitutionally protected rights of speech and association.<sup>187</sup>

c. *Seventh Circuit*

In 2011, Planned Parenthood of Indiana challenged the constitutionality of an Indiana law that prohibited state agencies from contracting or making grants with abortion providers.<sup>188</sup> Planned Parenthood argued that the statute placed an unconstitutional condition on government funding by forcing the organization to “choose between providing abortion services and receiving public [funds].”<sup>189</sup> The Seventh Circuit reiterated the Supreme Court’s language in *Rust* that “[t]he Government ha[d] no constitutional duty to subsidize an activity merely because the activity [was] constitutionally protected and may validly choose to fund childbirth over abortion.”<sup>190</sup> Thus, the Government was not required to remain “neutral between abortion providers and other medical providers,” particularly in matters of state funding.<sup>191</sup> The Seventh Circuit Court further concluded that Planned Parenthood’s claim was *entirely derivative* of a woman’s constitutional right to obtain an abortion and added that, “[i]t is settled law that the government’s refusal to subsidize [an] abortion does not impermissibly burden a woman’s right to obtain an abortion.”<sup>192</sup> Therefore,

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185. *Id.* at 995–96, 1006 (citing *Rust*, 500 U.S. at 194); Buckman, *supra* note 179, at § 12; *see also* OKLA. STAT. tit. 47, § 1104.6 (2002). The Oklahoma statutory scheme offered license plates with statements like *Choose Life* and *Adoption Creates Families*. *Hill*, 645 F. Supp. 2d at 995; *see also* OKLA. STAT. tit. 47, § 1104.6; *Special Interest Plates*, OKLA. TAX COMM’N, [http://www.ok.gov/tax/Individuals/Motor\\_Vehicle/Forms\\_&\\_Publications/Specialty\\_Plate\\_Forms/Special\\_Interest\\_Plates.html](http://www.ok.gov/tax/Individuals/Motor_Vehicle/Forms_&_Publications/Specialty_Plate_Forms/Special_Interest_Plates.html) (last modified Jan. 18, 2018). In addition to providing abortion services, plaintiff NGO provided adoption services. *Hill*, 645 F. Supp. 2d at 996–97.

186. *Hill*, 645 F. Supp. 2d at 1006.

187. *Id.*

188. *Planned Parenthood of Ind., Inc. v. Comm’r of Ind. State Dep’t of Health*, 699 F.3d 962, 967 (7th Cir. 2012).

189. *Id.* at 968.

190. *Id.* at 987–88 (quoting *Rust v. Sullivan*, 500 U.S. 173, 201 (1991)) (alteration in original).

191. *Id.* at 988.

192. *Id.* at 969.



the Indiana law did not constitute an unconstitutional condition on funding because it did not *directly* violate a woman's right to obtain an abortion.<sup>193</sup>

D. *Alliance v. USAID*

The Supreme Court of the United States recently issued an important decision on unconstitutional conditions on federal funding in *Agency for International Development v. Alliance for Open Society International, Inc.* Domestic organizations that received federal funding under the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act ("Leadership Act"), sought a declaratory judgment asserting that the Leadership Act's policy requirement violated their First Amendment rights by requiring them to affirmatively oppose prostitution to receive funding.<sup>194</sup> The organizations wished to remain neutral on the issue, and "fear[ed] that adopting a policy explicitly opposing prostitution" would diminish the program's effectiveness by making it harder to work with prostitutes in efforts to eradicate HIV/AIDS.<sup>195</sup> Furthermore, NGOs were concerned that the Policy restrictions would *require them to censor* privately-funded publication and research content concerning the prevention of *HIV/AIDS among prostitutes*.<sup>196</sup>

The Supreme Court agreed that the Policy requirement infringed First Amendment rights by requiring recipients to *pledge allegiance* to a Policy they did not accept as their own.<sup>197</sup> Although the recipient could simply choose to forego government funding, the Government could not deny a benefit on the basis of infringing on the constitutional right to free speech.<sup>198</sup> A condition on federal funding needs to be coercive in order to be categorized as impermissible.<sup>199</sup> Moreover, the Court warned, "Congress

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193. *Planned Parenthood of Ind., Inc.*, 699 F.3d at 969.

194. *Agency for Int'l Dev.*, 133 S. Ct. at 2326, 2331; *see also* U.S. CONST. amend. I.

195. *Agency for Int'l Dev.*, 133 S. Ct. at 2326.

196. *Id.*

197. *Id.* at 2332; *see also* U.S. CONST. amend. I.

198. *Agency for Int'l Dev.*, 133 S. Ct. at 2328. USAID argued that the Leadership Act conditions did not infringe constitutional rights because grantees had the option to work with independent affiliates that did not adopt the Policy, or grantees could *reject funding themselves* and create an affiliate that would abide by the terms, but *whose sole purpose* would be to receive the funds. *Id.* at 2331. The Supreme Court rejected these alternatives, explaining that affiliates could not serve that purpose when the recipient was forced to adopt a belief as its own. *Id.* On one hand, if the affiliate was clearly distinct from the recipient, the arrangement would still prevent the recipient from expressing its beliefs. *Id.* On the other hand, if an affiliate was identified with the recipient, the recipient could express those beliefs "only at the price of evident hypocrisy." *Id.*

199. Ruffin, *supra* note 162, at 1135–37.

[could not] recast a [discriminatory] condition” as a permissible funding decision in each case, “lest the First Amendment be reduced to a simple semantic exercise.”<sup>200</sup>

According to the majority, to distinguish between impermissible and permissible restrictions, “the relevant distinction [lays] . . . between conditions that define the limits of” a funding program Congress has agreed to subsidize, “and conditions that [attempted] to leverage funding to regulate speech outside” the program’s scope.<sup>201</sup> The Court recognized the difficulty in drawing the distinction between both types of conditions, in part, because a program’s scope could *always be manipulated* to encompass the restricted activity.<sup>202</sup> Albeit this complication, the Court unequivocally held the Leadership Act restriction as unconstitutional, reasoning that “[b]y requiring recipients to profess a specific belief, the Policy Requirement [went] beyond defining the limits of the federally funded program to defining the recipient.”<sup>203</sup>

Perhaps foreseeing the potential implications the *Agency for International Development* decision could have, the Court distinguished the Leadership Act’s restrictions from those in *Rust*, explaining that conditions on Title X funds targeting abortion providers were constitutional because they only regulated activities that fell within the scope of Title X projects.<sup>204</sup> In *Rust*, the majority explained that the government’s conditions did not restrict grantees from *engag[ing] in abortion advocacy on their own time and dime*; as long as those activities were kept separate from Title X projects, grantees were free to speak in favor of abortion.<sup>205</sup> Based on this separation of activities, the majority in *Agency for International Development* concluded that Title X regulations in *Rust* “did not run afoul of the First Amendment.”<sup>206</sup>

Justice Scalia dissented from the majority’s opinion in *Agency for International Development*, arguing that the Leadership Act’s restrictions on funding were well within the program’s scope, precisely because eliminating prostitution was “an objective of the HIV/AIDS program.”<sup>207</sup> Moreover, he

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200. *Agency for Int’l Dev.*, 133 S. Ct. at 2328 (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001)); *see also* U.S. CONST. amend. I.

201. *Agency for Int’l Dev.*, 133 S. Ct. at 2328.

202. *Id.*

203. *Id.* at 2330, 2332.

204. *Id.* at 2329–30 (citing *Rust v. Sullivan*, 500 U.S. 173, 196 (1991)); *see also* Paul M. Smith et al., *Supreme Court Issues Significant Decision on Unconstitutional Conditions Doctrine*, COMM. LAW., Nov. 2013, at 26, 26.

205. *Agency for Int’l Dev.*, 133 S. Ct. at 2330 (quoting *Rust*, 500 U.S. at 196–97).

206. *Agency for Int’l Dev.*, 133 S. Ct. at 2330 (citing *Rust*, 500 U.S. at 197).

207. *Agency for Int’l Dev.*, 133 S. Ct. at 2333.

argued *[m]oney [was] fungible*, “and any promotion of prostitution” undermined the program’s objective.<sup>208</sup> More troubling to Justice Scalia, however, was that the majority opinion opened the door to more suits challenging the constitutionality of government funding restrictions that discriminated between relevant ideological positions.<sup>209</sup> Justice Scalia’s rationale was that “*it is quite impossible* to distinguish between the rare requirement that an organization make an ideological commitment as a condition of funding—as here—and the more common situation where the government must choose between applicants on *relevant ideological grounds*.”<sup>210</sup>

## 1. Unconstitutional Conditions Post-Alliance

### a. Eleventh Circuit

Since the Supreme Court of the United States issued its decision in *Agency for International Development*, at least two federal courts have ruled viewpoint-discriminatory conditions targeting abortion providers as unconstitutional conditions on funding.<sup>211</sup> In 2016, Planned Parenthood of Southwest and Central Florida challenged a Florida statutory amendment that defunded abortion providers regardless of their separation of abortion and non-abortion related services.<sup>212</sup> Relying on the unconstitutional condition test delineated by the Supreme Court in *Agency for International Development*, the United States District Court for the Northern District of Florida found the defunding provision unconstitutional.<sup>213</sup> Under the *relevant distinction* analysis provided by Chief Justice John Roberts in *Agency for International Development*, “[t]he defunding provision [had] nothing to do with the state and local spending programs . . . which address[ed] [issues] like . . . sexually transmitted diseases [(“STDs”)] and

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208. *Id.* at 2333–34.

209. *Id.* at 2335.

210. Smith et al., *supra* note 205, at 27 (quoting *Agency for Int’l Dev.*, 133 S. Ct. at 2335).

211. Buckman, *supra* note 179, at § 9; *see also Agency for Int’l Dev.*, 133 S. Ct. at 2332, 2335; *Planned Parenthood of Greater Ohio v. Hodges*, 201 F. Supp. 3d 898, 906, 908 (S.D. Ohio 2016); *Planned Parenthood of Sw. & Cent. Fla. v. Philip*, 194 F. Supp. 3d 1213, 1217–18, 1220 (N.D. Fla. 2016).

212. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1215; *see also Act Effective March 25, 2016*, ch. 2016-150, § 390.011, 2016 Fla. Laws 2.

213. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1217; *see also Agency for Int’l Dev.*, 133 S. Ct. at 2328.

dropout prevention.”<sup>214</sup> Therefore, the State could not label the defunding provision as a condition that defined the limits of the spending program—here, the defunding provision was “an effort to leverage the funding of those programs to reach abortion services.”<sup>215</sup>

The defunding provision went beyond existing Florida law that already prohibited the use of state or local funds to provide, or support, provisions by prohibiting recipients of state funds from separately providing abortion services on their *own time and dime*.<sup>216</sup> Reverberating Justice Blackmun’s dissent in *Rust*, the district court explained that the Florida Legislature refused to fund non-abortion related services offered by Planned Parenthood because the organization chose to provide abortions with private funds.<sup>217</sup> Put simply, “[t]he [S]tate’s only beef [was] that the plaintiffs provide[d] abortions.”<sup>218</sup>

The district court further explained that the State’s contention that appropriating funding to non-abortion related services could indirectly support the provision of abortions given the fungible nature of money failed on both the facts and the law.<sup>219</sup> It failed as a matter of fact because Planned Parenthood had submitted proof that, under the statutory amendments, their non-abortion related programs were the *net losers* and “[a] program that cost[] more than [what] it [brought] in [could not] indirectly support an unrelated program.”<sup>220</sup> The contention failed as a matter of law because the Supreme Court had made clear in *Agency for International Development* that “the cross-funding argument does not prevent application of the unconstitutional-conditions doctrine.”<sup>221</sup> The State, similar to USAID in *Agency for International Development*, had failed to offer any support that cross-funding would occur.<sup>222</sup>

Finally, the district court rejected the State’s argument that a funding condition could only be held unconstitutional if such condition placed an *undue burden* on a woman’s right to obtain an abortion.<sup>223</sup> The undue

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214. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1217 (citing *Agency for Int’l Dev.*, 133 S. Ct. at 2328).

215. *Id.* at 1217–18.

216. *Id.* at 1216 (quoting *Agency for Int’l Dev.*, 133 S. Ct. at 2330).

217. *Id.* at 1216, 1218, 1224; *see also Rust v. Sullivan*, 500 U.S. 173, 210 (1991).

218. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1218.

219. *Id.* at 1219.

220. *Id.*

221. *Id.*; *Agency for Int’l Dev.*, 133 S. Ct. at 2331.

222. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1219; *Agency for Int’l Dev.*, 133 S. Ct. at 2331.

223. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1220 (citing *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016)).

burden test described in seminal cases like *Whole Woman's Health v. Hellerstedt*<sup>224</sup> and *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>225</sup> were unrelated to the unconstitutional conditions doctrine and applying it in this context—public funding decisions—was simply illogical.<sup>226</sup> The district court ultimately held that Planned Parenthood had demonstrated a likelihood of success on the merits of their claim that the statutory amendment was unconstitutional—thus, enjoining the State from enforcing the statutory provision.<sup>227</sup>

b. *Sixth Circuit*

Later in 2016, the District Court for the Southern District of Ohio held that an Ohio statutory provision prohibiting the State from granting funds to abortion providers for non-abortion related services constituted an unconstitutional condition on government funding.<sup>228</sup> According to the district court, the statute placed a speech-based condition on recipients in violation of their First Amendment rights.<sup>229</sup> The court turned to the Supreme Court's analysis in *Rust*, explaining that by regulating the recipients' activities outside the publicly funded programs, the condition did not "leave the grantee unfettered in its other activities."<sup>230</sup> The statutory conditions "[sought] to leverage funding to regulate speech outside the contours of the [publicly funded] program[s]."<sup>231</sup> Those programs included: "[T]ests and treatment for STDs, cancer screenings for women, HIV testing, . . . prevention of sexual violence," and other related activities.<sup>232</sup> Nothing within those programs—the district court said—was related to performing abortions.<sup>233</sup>

The Ohio Department of Health ("ODH") contended that the provision was constitutional because it did *not compel any speech*.<sup>234</sup> The

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224. 136 S. Ct. 2292 (2016).

225. 505 U.S. 833 (1992).

226. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1220; *see also Whole Woman's Health*, 136 S. Ct. at 2309; *Planned Parenthood of Se. Pa.*, 505 U.S. at 878.

227. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1220, 1224.

228. *Planned Parenthood of Greater Ohio v. Hodges*, 201 F. Supp. 3d 898, 900–01, 906 (S.D. Ohio 2016).

229. *Id.* at 906, 908; *see also* U.S. CONST. amend. I.

230. *Planned Parenthood of Greater Ohio*, 201 F. Supp. 3d at 905 (quoting *Rust v. Sullivan*, 500 U.S. 173, 196 (1991)).

231. *Id.* at 906 (quoting *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013)).

232. *Id.*

233. *Id.* at 906.

234. *Id.* at 905–06.

district court rejected the government's distinction, arguing that in *Agency for International Development*, "[t]he Supreme Court ha[d] explained that an unconstitutional condition [was] not limited to [a] situation . . . 'when the condition is actually coercive.'"<sup>235</sup> Instead, the relevant distinction was whether the condition defined the limits of government spending or attempted "to regulate speech outside the contours of the program."<sup>236</sup> ODH further argued that a condition was only unconstitutional if it placed an undue burden on a woman's right, based on the seventh circuit's decision in *Planned Parenthood of Indiana*.<sup>237</sup> The court reiterated that the undue burden test was irrelevant in that context, stating that, "[t]his Court has serious doubts as to whether it is proper to import the undue burden analysis . . . here, which Defendant has acknowledged is *a case about money*."<sup>238</sup> Based on these reasons, the District Court for the Southern District of Ohio permanently enjoined the State from enforcing the statute.<sup>239</sup>

#### V. APPLICABILITY OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The terms of the Global Gag Rule are comparable to the statutory provisions declared unconstitutional by the district courts of the Northern District of Florida and the Southern District of Ohio.<sup>240</sup> For one, the administration's expanded version of the Gag Rule applies to health assistance programs, such as HIV/AIDS (PEPFAR), malaria, nutrition, hygiene, global health security, etc.—programs that have little or nothing to do with abortion.<sup>241</sup> The Department of State and USAID cannot claim that the Mexico City Policy allows the government to define the scope of each of these programs given that they are completely unrelated to abortion services.<sup>242</sup> Second, the Global Gag Rule regulates the grantees' activities beyond the contours of all health assistance programs—even those related to family planning and reproductive healthcare—by prohibiting NGOs from

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235. *Planned Parenthood of Greater Ohio*, 201 F. Supp. 3d at 905–06 (quoting *Agency for Int'l Dev.*, 133 S. Ct. at 2328).

236. *Id.* at 906 (quoting *Agency for Int'l Dev.*, 133 S. Ct. at 2328).

237. *Id.* at 910; see also *Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health*, 699 F.3d 962, 988 (7th Cir. 2012).

238. *Planned Parenthood of Greater Ohio*, 201 F. Supp. 3d at 910–11.

239. *Id.* at 912.

240. See *id.* at 900–01; *Planned Parenthood of Sw. & Cent. Fla. v. Philip*, 194 F. Supp. 3d 1213, 1215 (N.D. Fla. 2016).

241. See *KATES & MOSS*, *supra* note 67, at 1–2; Press Release, U.S. Dep't of State, *supra* note 29; *Starrs*, *supra* note 19, at 485–86.

242. See *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2328 (2013); *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1216–17; Press Release, U.S. Dep't of State, *supra* note 29.

providing or promoting abortion on their *own time and dime*.<sup>243</sup> Third, the Helms Amendment already prohibits the use of public funds to pay for abortion services overseas.<sup>244</sup> Similar to what the district court for the Northern District of Florida and Justice Blackmun expressed, the government is targeting abortion providers precisely *because* they provide abortions with private funds.<sup>245</sup> The current administration's *only beef* is that NGOs, like IPPF and MSI, provide and promote abortion as a method of family planning.<sup>246</sup> Fourth, by restricting NGOs from discussing abortion at any time, the government is attempting to impose its pro-life policy on domestic NGOs.<sup>247</sup> Like Chief Justice Roberts explained in *Agency for International Development*, a condition need not be coercive to impermissibly infringe on constitutional rights.<sup>248</sup> Fifth, the argument made by proponents of the Global Gag Rule—that tax monies should still be used to pay for abortion services both directly and indirectly—should fail as a matter of law based on the Supreme Court's stance in *Agency for International Development* that “the cross-funding argument does not prevent application of the unconstitutional conditions doctrine.”<sup>249</sup> Finally, the *undue burden test* or the *least restrictive means* approach should not be applied in the context of unconstitutional conditions targeting abortion providers.<sup>250</sup> Although the undue burden test is relevant to abortion rights, it is not necessarily relevant to First Amendment issues and funding decisions.<sup>251</sup>

## VI. CONCLUSION

After several developments in caselaw regarding unconstitutional conditions in funding, opponents of the Global Gag Rule might be able to

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243. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1216 (quoting *Agency for Int'l Dev.*, 133 S. Ct. at 2330); see also KAISER FAMILY FOUND., *supra* note 16, at 1–2.

244. 22 U.S.C. § 2151b(f) (2012); *Helms Amendment Hurts Women Worldwide*, *supra* note 45.

245. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1216–18; *Rust v. Sullivan*, 500 U.S. 173, 210 (1991) (Blackmun, J., dissenting); KAISER FAMILY FOUND., *supra* note 16, at 1–2.

246. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1217–18; Sifferlin, *supra* note 123; *Why We Will Not Sign the Global Gag Rule*, *supra* note 124.

247. See *Agency for Int'l Dev.*, 133 S. Ct. at 2330–32; Sifferlin, *supra* note 123.

248. *Agency for Int'l Dev.*, 133 S. Ct. at 2328.

249. *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1219; *Agency for Int'l Dev.*, 133 S. Ct. at 2331; KAISER FAMILY FOUND., *supra* note 16, at 1–2.

250. *Planned Parenthood of Greater Ohio v. Hodges*, 201 F. Supp. 3d 898, 911 (S.D. Ohio 2016).

251. See *id.*

successfully challenge its constitutionality.<sup>252</sup> In *Center for Reproductive Law and Policy v. George W. Bush*,<sup>253</sup> the Second Circuit found that CRLP had standing in relation to its Equal Protection claim based on a theory of *competitive advocate standing*—thus, recognizing that the government chose to favor anti-abortion organizations.<sup>254</sup> Nonetheless, CRLP’s claim failed on the merits based on the government’s authority to favor one viewpoint over another, as the Supreme Court held in *Rust*.<sup>255</sup> Since then, the Supreme Court issued its decision in *Agency for International Development*, and emphasized that conditions that restrict beyond the contours of a program are impermissible conditions on constitutionally protected rights.<sup>256</sup> Based on this *relevant distinction*, domestic NGOs, like IPPF and CRLP, might be able to demonstrate that, despite the government’s authority to favor one position over another, restrictions on funding cannot regulate NGOs’ activities beyond the federally funded program.<sup>257</sup>

In general, restrictions targeting abortion providers—at all levels of government—should be carefully examined.<sup>258</sup> Decisions like *Rust* and *Harris v. McRae*<sup>259</sup> “were premised on the assumptions that the government has a valid interest in discouraging abortion . . . and creating an incentive in favor of childbirth.”<sup>260</sup> But none of “these assumptions [are] consistent with the view that abortion is a private moral judgment.”<sup>261</sup> Supreme Court Justice Anthony Kennedy explained in his dissent in *Hill v. Colorado*,<sup>262</sup> that their decision in *Planned Parenthood of Southeastern Pennsylvania* had established that a woman’s decision whether to abort her child “was [at] its essence a moral one, a choice the State could not dictate,” and added that, “[f]oreclosed from using the machinery of government to ban abortions in early term, those who oppose it are remitted to debate the issue in its moral dimensions.”<sup>263</sup> By denying funding to recipients that provide or promote abortions—claiming that it is free to favor a pro-life position—the

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252. See *id.*; *Planned Parenthood of Sw. & Cent. Fla.*, 194 F. Supp. 3d at 1224.

253. 304 F.3d 183 (2d Cir. 2002).

254. *Id.* at 196–98.

255. *Id.*; *Rust v. Sullivan*, 500 U.S. 173, 192–94 (1991).

256. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S. Ct. 2321, 2330 (2013).

257. See *id.* at 2328, 2330; *The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health: Hearing Before the H.R. Comm. on Foreign Affairs*, *supra* note 68, at 36.

258. See Chemerinsky & Goodwin, *supra* note 2, at 1247.

259. 448 U.S. 297 (1980).

260. Chemerinsky & Goodwin, *supra* note 2, at 1241; see also *Rust*, 500 U.S. at 192–93; *Harris*, 448 U.S. at 324–26.

261. Chemerinsky & Goodwin, *supra* note 2, at 1241.

262. 530 U.S. 703 (2000).

263. *Id.* at 791.



government uses its *enormous power* to interfere with a woman's private decision.<sup>264</sup>

Finally, there are important policy considerations regarding the Global Gag Rule.<sup>265</sup> WHO reported in November 2016, that "approximately 830 women die from preventable causes related to pregnancy and childbirth" per day and, "[ninety-nine percent] of all maternal deaths occur in developing countries."<sup>266</sup> Restricting access to safe and legal abortions literally endangers women's lives around the globe.<sup>267</sup> Incoming administrations should not be allowed to "play politics with the lives of women and girls."<sup>268</sup> Moreover, implementing policies abroad that would be unconstitutional at home is hypocritical and undermines democratic values.<sup>269</sup> With officials like Senator Shaheen attempting to pass legislation that permanently bans the Global Gag Rule, there is hope for the future that a more representative Congress will work toward eliminating this undemocratic and dangerous Policy for good.<sup>270</sup>

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264. See *Harris*, 448 U.S. at 330.

265. BLOOM ET AL., *supra* note 114, at 8–9; *Why We Will Not Sign the Global Gag Rule*, *supra* note 124; see also Watts, *supra* note 96.

266. *Maternal Mortality*, WHO: MEDIA CTR., <http://www.who.int/mediacentre/factsheets/fs348/en/> (last updated Nov. 2016).

267. *Why We Will Not Sign the Global Gag Rule*, *supra* note 124.

268. Kate Hodal et al., 'Global Gag Rule': *Stop Playing Politics with Women's Lives, MSF Tells Trump*, GUARDIAN: US EDITION (Jan. 26, 2017, 2:15 PM), <http://www.theguardian.com/global-development/2017/jan/26/global-gag-rule-stop-playing-politics-with-womens-lives-msf-tells-trump>.

269. See Cohen, *supra* note 25, at 1–2.

270. See Jeanne Shaheen: U.S. Senator N.H., *supra* note 28, at 8:50.