

Trump’s Ruthless Expansion of the Mexico City Policy Threatens Reproductive Health Abroad

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Introduction

THE GLOBAL GAG RULE, also known as the Mexico City Policy, is a U.S. policy that refuses family planning assistance to foreign non-governmental organizations (“NGOs”) that “perform or actively promote abortion,” even with independently-sourced funding.¹ The Trump administration reinstated the Mexico City Policy and renamed it “Protecting Life in Global Health Assistance” (“PLGHA”).² PLGHA is a dangerous expansion of the policy, which previously applied to foreign assistance funded strictly by the United States Agency for International Development (USAID).³ Now, PLGHA limits *all* government departments and agencies from funding foreign NGOs that

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1. *Protecting Life in Global Health Assistance*, DEP’T OF HEALTH AND HUMAN SERVICES 1 (May 2017), https://grants.nih.gov/sites/default/files/HHSStandardProvision_ProtectingLifeinGlobalAssistance_HHS_May2017.pdf [<https://perma.cc/RV2Q-98EF>]; *Understanding Trump’s Global Gag Rule*, POPULATION ACTION INTERNATIONAL, <http://trumpglobalgagrule.pai.org/understanding-the-policy/> [<https://perma.cc/GU4L-SHW8>] (“[U]nder Trump’s Global Gag Rule, foreign NGOs are rendered ineligible to receive any U.S. global health assistance if the organization uses funding from any other source to perform abortion, counsel or refer for abortion, or advocate to make abortion legal or more available in their own countries.”).

2. Fact Sheet, U.S. Dep’t of State, Protecting Life in Global Health Assistance (May 15, 2017), <https://www.state.gov/r/pa/prs/ps/2017/05/270866.htm> [<https://perma.cc/928H-MTM6>] [hereinafter Fact Sheet].

3. *The Mexico City Policy: An Explainer*, HENRY J. KAISER FAM. FOUND. (May 15, 2018), <https://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer/> [<https://perma.cc/36YV-2LNY>].

provide abortions, reproductive counseling or referrals, and sexual and reproductive healthcare services.⁴ The policy's ostensible purpose is to ensure that no U.S. taxpayer money is used to fund programs that conduct coerced abortion or involuntary sterilization.⁵ However, laws already exist that restrict federal assistance to programs that conduct such activities.⁶ PLGHA forces foreign NGOs to choose between two options: (1) forego U.S. funding and conduct family planning services—such as abortion and providing modern contraception—on limited resources, or (2) forego offering comprehensive reproductive healthcare entirely. This ultimatum will close health clinics that manage HIV prevention efforts, malaria treatment, family planning and other healthcare services; drastically increase abortion rates; and ultimately cause serious health complications and death for women and girls across the globe.⁷

This paper will attempt to propose refined constitutional challenges to this senseless policy. Part I will recount the history of the Global Gag Rule from Reagan's instatement through Trump's dangerous expansion. Part II will then illustrate the significant statistical harm that the Global Gag Rule has imposed upon women and girls historically, as well as the projected impact of Trump's expansion. Next, Part III will discuss past failures to challenge the Global Gag Rule in court, as well as the ineffectiveness of congressional action in addressing the issues presented by the policy. Finally, Part IV will present an argument for extending the Supreme Court's holding in *Agency for International Development v. Alliance for Open Society International, Inc.* as a means of challenging the Global Gag Rule as an unconstitutional condition on federal spending.

4. *Id.*

5. Report, U.S. Dep't of State, Protecting Life in Global Health Assistance Six-Month Review (Feb. 6, 2018), <https://www.state.gov/f/releases/other/278012.htm> [<https://perma.cc/3Y92-AFJ6>] [hereinafter Report].

6. *The Mexico City Policy: An Explainer*, *supra* note 3 (The 1973 Helms Amendment prohibits the use of U.S. aid "to pay for the performance of abortion as a method of family planning or to motivate or coerce any person to practice abortion." The 1981 Biden Amendment prohibits U.S. aid to fund "biomedical research related to methods of or the performance of abortion as a means of family planning." The 1981 Siljander Amendment prohibits the use of U.S. aid "to lobby for or against abortion." The 1985 Kemp-Kasten Amendment prohibits "the use of U.S. aid to fund any organization or program, as determined by the president, that supports or participates in the management of a program of coercive abortion or involuntary sterilization.").

7. Vice News, *Global Gag Rule Debrief*, YouTube (MAY 21, 2018), [HTTPS://WWW.YOUTUBE.COM/WATCH?V=H71o0G4Hd28&t=250s](https://www.youtube.com/watch?v=H71o0G4Hd28&t=250s).

I. The Inception of the Mexico City Policy to Trump's PLGHA

The Mexico City Policy is an inhumane policy that requires foreign NGOs to certify that they will not use *any* funds to “perform or actively promote abortion as a method of family planning” as a condition of receiving U.S. foreign assistance.⁸ This section will illustrate how the Global Gag Rule has become a partisan issue, from its inception during the Reagan presidency, its repeal under Bill Clinton, its subsequent reinstatement under George W. Bush, yet another repeal under Barack Obama, to its present-day reinstatement and expansion under the Trump administration.

A. Reagan's Instatement of the Mexico City Policy

In August 1984, the Reagan administration first announced the policy at the second International Conference on Population in Mexico City, Mexico, hence the name: Mexico City Policy.⁹ Opponents of the policy renamed it the Global Gag Rule (“GGR”), because among other activities, it gags foreign NGOs from conducting and discussing abortion and abortion-related activities.¹⁰ Compliance with the Mexico City Policy allowed foreign NGOs to receive U.S. family planning assistance; however, compliance meant they were prohibited from conducting abortions, providing information about abortion as a method of family planning, and lobbying foreign governments to legalize abortion.¹¹

The 1984 instatement of the Mexico City Policy expanded legislative restrictions that already prohibited U.S. funding for abortion overseas.¹² Before its instatement, international NGOs could use independent funding to engage in abortion-related activities if such funds

8. *Protecting Life in Global Health Assistance*, *supra* note 1, at 1.

9. Policy Statement by the United States, United Nations International Conference on Population in Mexico City (Aug. 13–16, 1984), <https://abortion.procon.org/source/files/MexicoCityPolicy1984.pdf> [<https://perma.cc/2E67-ZD9R>].

10. See *The Mexico City Policy: An Explainer*, *supra* note 3.

11. *Id.*

12. See Luisa Blanchfield, *Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Law and Policy*, CONGRESSIONAL RESEARCH SERVICE 4 (Apr. 5, 2018), <https://fas.org/sgp/crs/row/R41360.pdf> [<https://perma.cc/QAB3-Z76H>] (“The Helms amendment [to the Foreign Assistance Act (FAA) introduced in 1973] prohibits the use of U.S. foreign assistance funds to perform abortions or to motivate or coerce individuals to practice abortions.” And “[i]n 1981, Congress passed [the Biden] amendment to the FAA specifying that the United States may not provide foreign assistance for biomedical research related to abortion or involuntary sterilization.”).

were held in separate accounts from U.S. funding.¹³ Compliance with the Mexico City Policy expanded the U.S. government's control of foreign NGOs by prohibiting them from engaging in abortion-related activities if they received U.S. family planning assistance.¹⁴ Using independently-sourced funds and keeping the funds in separate accounts were no longer authorized.¹⁵

B. Reinstatement and Rescission of the Policy

Following the end of Reagan's presidency in 1989, the Mexico City Policy remained in effect under President George H.W. Bush.¹⁶ In 1993, President Bill Clinton rescinded the policy,¹⁷ but President George W. Bush reinstated it in 2001.¹⁸ Bush implemented the policy through conditions in USAID grant awards and extended the policy to "voluntary planning" assistance provided by the Department of State.¹⁹ The Bush administration also cut off all U.S. support for the United Nations Population Fund (UNFPA), which supports reproductive healthcare for women, promotes voluntary family planning, and reduces the need for abortion in over 150 poor countries.²⁰

C. President Obama Rescinds the Global Gag Rule

On January 23, 2009, President Barack Obama issued a memorandum rescinding President Bush's 2001 reinstatement of the

13. See *The Mexico City Policy: An Explainer*, *supra* note 3.

14. *The Mexico City Policy: A Short History*, POPULATION RESEARCH INSTITUTE (Jan. 1, 2008), <https://www.pop.org/the-mexico-city-policy-a-short-history/> [<https://perma.cc/W722-7QDN>].

15. See *id.*

16. See *The Mexico City Policy: An Explainer*, *supra* note 3.

17. *Id.* (The policy was legislatively reinstated for one year during his term as part of a deal to relieve U.S. debt to the United Nations. President Clinton partially waived the policy's restrictions, such that \$12.5 million of U.S. family planning assistance funding would be allocated to maternal and child health assistance.).

18. *Id.*

19. Mexico City Policy and Assistance for Voluntary Population Planning, 74 Fed. Reg. 4903 (Jan. 23, 2009).

20. Susan A. Cohen, *Bush Bars UNFPA Funding, Bucking Recommendation of Its Own Investigators*, GUTTMACHER INSTITUTE (Oct. 1, 2002), <https://www.guttmacher.org/gpr/2002/10/bush-bars-unfpa-funding-bucking-recommendation-its-own-investigators> [<https://perma.cc/4D3C-5RW8>]; *Obama Rescinds "Global Gag Rule," Commits to Funding UNFPA*, GUTTMACHER INSTITUTE (Jan. 23, 2009), <https://www.guttmacher.org/article/2009/01/obama-rescinds-global-gag-rule-commits-funding-unfpa> [<https://perma.cc/MA29-GXH3>] (The United Nations Population Fund was formerly known as the United Nations Fund for Population Activities; despite the change in name, the acronym has remained the same.).

GGR.²¹ Obama stated that the “excessively broad” and “unwarranted” conditions of the policy “undermined efforts to promote safe and effective voluntary family planning programs in foreign nations.”²² He revoked Bush’s memo that extended the policy to the Department of State and worked with Congress to restore U.S. funding to the UNFPA.²³ Obama stated, “[f]or too long, international family planning assistance has been used as a political wedge issue, the subject of a back and forth debate that has served only to divide us. I have no desire to continue this stale and fruitless debate.”²⁴ Unfortunately, the annulment of the Global Gag Rule only lasted as long as Obama’s presidency.

D. Trump’s Reinstatement and Ruthless Expansion

Just days after his presidential inauguration, Donald Trump reinstated and expanded the Mexico City Policy, with then-Secretary of State Rex Tillerson’s approval.²⁵ The Trump administration’s version, named “Protecting Life in Global Health Assistance,” tremendously expanded the Global Gag Rule.²⁶ Trump’s January 23, 2017 Executive Order extended the reinstated policy²⁷ to “global health assistance furnished by *all* departments or agencies.”²⁸ The Executive Order further directed the Secretary of State “to take *all necessary actions*, to the extent permitted by law, to ensure that U.S. taxpayer dollars do not fund organizations or programs that *support* or *participate* in the management of a program of coercive abortion or involuntary sterilization.”²⁹ The policy does not apply to global health assistance to

21. Mexico City Policy and Assistance for Voluntary Population Planning, 74 Fed. Reg. 4903.

22. *Id.*

23. Peter Baker, *Obama Reverses Rules on U.S. Abortion Aid*, N. Y. TIMES (Jan. 23, 2009), <http://www.nytimes.com/2009/01/24/us/politics/24obama.html> [On file with USF Law Review].

24. *Id.*

25. Fact Sheet, *supra* note 2.

26. *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/WUZ4-X4K9>].

27. Donald Trump’s January 23, 2017 Presidential Memorandum reinstated “the Presidential Memorandum of January 22, 2001, for the Administrator of the United States Agency for International Development (Restoration of the Mexico City Policy).” According to the Federal Register, no such Presidential Memorandum was issued on January 22, 2001. The Executive Officer of the President issued the presumed reinstated memo on March 28, 2001. *See* Restoration of the Mexico City Policy, 66 Fed. Reg. 17303 (March 28, 2001).

28. The Mexico City Policy, 82 Fed. Reg. 8495 (Jan. 23, 2017) (emphasis added).

29. *Id.* (emphasis added).

national or local governments, public international organizations, humanitarian assistance, USAID disaster and humanitarian-relief activities, and U.S. Department of Defense disaster and humanitarian relief.³⁰

In its previous versions, the Mexico City Policy applied to family planning, reproductive health assistance, and funding from USAID.³¹ Under Trump's expansion, it applies for the first time to foreign assistance for funding for HIV under the President's Emergency Plan For AIDS Relief (PEPFAR), maternal and child health, nutrition, tuberculosis, malaria, neglected tropical diseases, global health security, and other programs.³² Previously, the policy applied to \$600 million in funding.³³ The expanded version is predicted to encompass \$7.4 billion in funding.³⁴ In May 2017 the Department of State reported that approximately \$6 billion of that amount includes funding for the PEPFAR program, and the remaining funding is for USAID family planning, reproductive health, maternal health, and other programs.³⁵ In addition to global health funding by USAID and the Department of State, the rule now applies to the Department of Defense, Centers for Disease Control and Prevention, the Department of Health and Human Services, the National Institutes of Health, the Food and Drug Administration, and even to Peace Corps volunteers working on family planning.³⁶ The policy also applies to all new funding agreements for global health assistance: grants, cooperative agreements, and for the first time, contracts, as well as to amendments to existing agreements.³⁷ Purportedly, according to the Department of State, "funding previously obligated [to international health programs] will not be affected as a result of [the] policy."³⁸ There are presently no updates reporting whether such a promise has been upheld.

Ultimately, foreign NGOs will face two options: either receive global health assistance awards and comply with the terms of PLGHA,

30. Fact Sheet, *supra* note 2.

31. See *The Mexico City Policy: An Explainer*, *supra* note 3.

32. *Id.*

33. *Id.*

34. *The Mexico City Policy: An Explainer*, *supra* note 3.

35. Fact Sheet, *supra* note 2.

36. Sarah Wildman, *Trump's global abortion gag rule goes much further than any previous administration*, Vox (Jan. 26, 2017, 8:20 AM), <https://www.vox.com/policy-and-politics/2017/1/26/14384260/global-gag-rule-trump-abortion-womens-health-global-health-world> [<https://perma.cc/623C-SQKJ>]; *The Mexico City Policy: An Explainer*, *supra* note 3.

37. Fact Sheet, *supra* note 2.

38. *Id.*

or forfeit U.S. foreign assistance virtually entirely. This ultimatum shows a disturbing disregard for women and girls' lives, particularly in the world's most vulnerable communities.³⁹ Yet, the Department of State claims that it will remain deeply committed to global health worldwide and to the well-being of women and children.⁴⁰

E. Trump's Initial Implementation of PLGHA

The Department of State announced that as of May 15, 2017, departments and agencies affected by PLGHA will either start the mandatory processes for approving a new standard provision, or, where possible, immediately include the provision in all new grants and cooperative agreements that provide global health assistance.⁴¹ Departments and agencies will also apply a new standard provision to existing grants and cooperative agreements when they are amended to add new funding.⁴²

On May 22, 2017, USAID added language for PLGHA in a partially revised version of the Standard Provisions for U.S. and non-U.S. Nongovernmental Organizations.⁴³ The added PLGHA provisions are replicated from Bush's 2001 Restoration of the Mexico City Policy.⁴⁴ The regulations in the USAID Standard Provisions do not yet reflect Trump's extension of the requirements to apply to all U.S. departments and agencies.⁴⁵

Officials from the Department of State reported that they will measure compliance with the policy through "ongoing monitoring [] programs."⁴⁶ According to officials, U.S. government personnel in PLGHA-compliant countries and large implementing partners will pay regular visits to sites that receive funding assistance.⁴⁷ During the visits, personnel will monitor what the programs are doing and what in-

39. See *The Harmful Impact of the Global Gag Rule*, POPULATION ACTION INTERNATIONAL, <https://pai.org/wp-content/uploads/2017/10/GGR-Impact-One-Pager-3-2.pdf> [https://perma.cc/2WRL-N32X].

40. Special Briefing, U.S. Dep't of State, Background Briefing: Senior Administration Officials on Protecting Life in Global Health Assistance (May 15, 2017), <https://www.state.gov/r/pa/prs/ps/2017/05/270879.htm> [https://perma.cc/KL5K-42EJ] [hereinafter Special Briefing].

41. *Id.*

42. *Id.*

43. *Protecting Life in Global Health Assistance*, *supra* note 1.

44. See Restoration of the Mexico City Policy, 66 Fed. Reg. 17303.

45. See *Standard Provisions for Non-U.S. Nongovernmental Organizations*, USAID 85 (June 7, 2018), <https://www.usaid.gov/sites/default/files/documents/1868/303mab.pdf> [https://perma.cc/M8EE-HRLR].

46. Special Briefing, *supra* note 40.

47. Report, *supra* note 5.

formation they are administering to the press.⁴⁸ Moreover, in order to monitor the quality of the services, the sites must administer quarterly reports on their services and the gender and estimated age of the person receiving such services.⁴⁹ As will be discussed subsequently, reports of such monitoring programs have proved unfinished and incomprehensive.⁵⁰

II. Studies Show Trump's PLGHA Will Do Exponentially More Damage than Previous Iterations of the Mexico City Policy

The Mexico City Policy was enacted to impose the Reagan administration's pro-life stance on abortion on the international community by curtailing the flow of U.S. funds to organizations that provided abortion-related services. Presumably, the rationale behind instating the policy was that by taking federal action to discourage abortions, such abortions would not occur. However, as studies demonstrate, abortions have increased under every reinstatement of the Global Gag Rule.⁵¹ Further, without access to medical counseling, women are forced to take rash and dangerous steps to facilitate abortions, which has resulted in deadly consequences.⁵² Trump's PLGHA represents the most dangerous iteration yet, as it restricts U.S. funding from a multitude of federal assistance programs and departments. Beyond the deaths that are bound to result from unsafe abortions and limited access to healthcare, Trump's reckless extension will impact almost every aspect of medical care internationally, and have a particularly detrimental impact on already crucially underserved areas.

The Global Gag Rule blocks a massive range of health services for women and girls across the globe. A 2011 Stanford study analyzing the effects of previous forms of the policy found a strong correlation between the Mexico City Policy and increased abortion rates in sub-

48. *Id.*; Special Briefing, *supra* note 40.

49. Report, *supra* note 5.

50. See *infra* Part III(B)(ii).

51. Eran Bendavid, Patrick Avila, & Grant Miller, *United States aid policy and induced abortion in sub-Saharan Africa*, 89 BULLETIN OF THE WORLD HEALTH ORG. 873, 877 (2011), <http://www.who.int/bulletin/volumes/89/12/11-091660.pdf> [<https://perma.cc/6Z6A-ZWJ>] ("Our study found robust empirical patterns suggesting that the Mexico City Policy is associated with increases in abortion rates in sub-Saharan African countries.")

52. *Coalition Statement on Opposing the Global Gag Rule*, REFUGEES INTERNATIONAL (Jan. 24, 2017), <https://www.refugeesinternational.org/advocacy-letters-1/global-gag-rule> [<https://perma.cc/F3ZV-AF8V>].

Saharan Africa.⁵³ The study found that when the GGR was reinstated, the United States' decreased foreign assistance for family planning may have led women to substitute abortion for contraception.⁵⁴ As the world's largest funder of global health assistance,⁵⁵ the United States serves as the key provider of women's health services in sub-Saharan African countries.⁵⁶

Many rural areas do not have freestanding family planning clinics, but rather integrated health clinics that offer all types of health-care services, from birth control to immunization.⁵⁷ In compliance with PLGHA, such clinics, if they even mention abortion, will not receive U.S. foreign assistance.⁵⁸ In previous implementations of the Global Gag Rule, organizations that continued providing abortion-related family planning services lost funding, which forced them to cut staff, services, and often close clinics.⁵⁹ According to a report by Population Action International, when the Planned Parenthood Association of Ghana did not conform to the policy in 2003, sixty-seven staff members were fired and nursing staff was reduced by forty-four percent.⁶⁰ From a loss of only \$200,000 in USAID funding, these cuts affected 1,327 communities.⁶¹ Family Health Options of Kenya stated:

After refusing the terms of the gag rule in 2001, at Family Health Options Kenya we lost a significant amount of funding from USAID with serious and damaging effects . . . [to] critical services [for] poor and underserved populations in urban, peri-urban and rural areas including family planning, voluntary counseling and testing for HIV, management of sexually transmitted infections, post-abortion care and maternal and child health services. Following the closure of these clinics in 2005, at least 9,000 people—primarily women and children—were left with little or no access to healthcare.⁶²

53. Bendavid, Avila, & Miller, *supra* note 51, at 877.

54. *Id.* at 873 (“Reduced financial support for family planning may have led women to substitute abortion for contraception.”).

55. Casey Quackenbush, *The Impact of President Trump's 'Global Gag Rule' on Women's Health is Becoming Clear*, TIME (Feb. 4, 2018), <http://time.com/5115887/donald-trump-global-gag-rule-women/> [<https://perma.cc/YG4N-8XDL>].

56. See *The Mexico City Policy: An Explainer*, *supra* note 3.

57. Wildman, *supra* note 36.

58. *Id.*

59. *Trump's 'Mexico City Policy' or 'Global Gag Rule'*, *supra* note 26.

60. The Glob. Gag Rule Impact Project, *Access Denied—The Impact of the Global Gag Rule*, POPULATION ACTION INTERNATIONAL 3 (2005), <http://pai.org/wp-content/uploads/2016/12/Access-Denied-The-Impact-of-the-Global-Gag-Rule-in-Ghana.pdf> [<https://perma.cc/R6ZP-PMTQ>].

61. *Id.* at 1–3.

62. *Coalition Statement on Opposing the Global Gag Rule*, *supra* note 52.

These shortages and closings led to a disturbing number of unsafe and often deadly consequences for women and girls in the world's poorest countries. A study of twenty-six countries in the developing world found that every year, twenty-two million unsafe abortions take place and seven million women receive treatment in healthcare facilities for complications due to unsafe abortions.⁶³ Further, 22,000 women die from unsafe abortions annually, and thousands more are left disabled.⁶⁴ When the Global Gag Rule was implemented under Bush, the number of women who died as a result of unsafe abortions tripled to 68,000.⁶⁵

A study by the Kaiser Family Foundation found that more than half the countries that receive U.S. global health assistance allow for legal abortion in at least one case not permitted by the policy.⁶⁶ The Global Gag Rule shrank resources that help support access to contraception and safe abortions in developing countries, hampered HIV prevention efforts, eliminated outreach efforts to hard to reach populations, contributed to the closing of health clinics, and correlated with higher abortion rates in sub-Saharan African countries.⁶⁷ Previously, the Mexico City Policy impacted \$600 million in foreign aid.⁶⁸ The expanded PLGHA is predicted to affect \$7.4 billion in foreign aid.⁶⁹ Latanya Mapp Frett, Executive Director of Planned Parenthood Global stated:

This is an unprecedented move, and the most extreme executive action we've seen of its kind [T]his action will be catastrophic for all communities, especially those relying on U.S. funding to address HIV/AIDS and maternal healthcare, and the fight against Zika. We know the good that can come from investing in family planning—maternal mortality rates have declined over the last decade, and family planning, which prevents unsafe abortion, was a

63. Wiley, *The global cost of unsafe abortion*, SCIENCE DAILY (Aug. 19, 2015), <https://www.sciencedaily.com/releases/2015/08/150819083138.htm> [https://perma.cc/29C3-UF LS].

64. *Id.*

65. Phil Hay & Magda Garcia, *Deprived of Contraception, Poor Women in Developing World Bear Millions of Unintended Pregnancies*, THE WORLD BANK (July 10, 2008), <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:21835941~pagePK:34370~piPK:34424~theSitePK:4607,00.html> [https://perma.cc/2FKX-BN5S].

66. *The Mexico City Policy: An Explainer*, *supra* note 3.

67. *Impact of Expanded Global Gag Rule on Women's Health*, CTR. FOR HEALTH & GENDER EQUITY, http://www.genderhealth.org/files/uploads/change/publications/GGR_Fact_Sheet_UPDATED_March_7_2017.pdf (last updated Feb. 2018) [https://perma.cc/ZN94-TDRE]; *The Mexico City Policy: An Explainer*, *supra* note 3.

68. *The Mexico City Policy: An Explainer*, *supra* note 3.

69. *Id.*

key factor in this. This expanded version of the global gag rule threatens to undermine and even reverse that progress.⁷⁰

Bush's iteration of the GGR restricted \$600 million in USAID funding and had a threefold impact on the number of deaths caused by unsafe abortions.⁷¹ Trump's PLGHA affects roughly twelve times more international aid funding than Bush's GGR;⁷² thus, the potential impact of PLGHA could result in at least thirty-six times more deaths.

Trump's expansion of the Global Gag Rule has a stunning effect on individual non-profit organizations that specifically cater international assistance to helping women and girls achieve greater access to reproductive health. One such organization, Marie Stopes International ("MSI"), works in thirty-seven countries to provide women and families contraception and abortion services.⁷³ MSI estimates that without alternate sources of funding for its organization between 2017 and 2020, Trump's PLGHA could result in 2 million fewer women with access to contraception services; 2.5 million unintended pregnancies; 870,000 unsafe abortions; and 6,900 avoidable maternal deaths.⁷⁴ These statistics only reflect the impact PLGHA has on the services that MSI provides. Undoubtedly, the impact of the expanded policy around the globe will be even greater.

While previous administrations have implemented the GGR to impose an anti-abortion stance internationally, the Trump administration is abusing its power by imposing even broader restrictions on U.S. foreign assistance. This policy particularly harms those in third-world countries that already suffer from limited access to general healthcare. The GGR denies them access to safe contraception and abortion and leads clinics that provide comprehensive healthcare to shut down due to insufficient funding, resulting in the deaths of individuals, families, and entire communities.⁷⁵ Further, studies demonstrate that the GGR will continue to force individuals to perform and undergo un-

70. *Planned Parenthood Condemns Unprecedented Move by President Trump that Jeopardizes Vulnerable Women, Children and Communities Worldwide* Planned Parenthood, PLANNED PARENTHOOD (Jan. 24, 2017), <https://www.plannedparenthood.org/about-us/newsroom/press-releases/planned-parenthood-condemns-unprecedented-move-by-president-trump-that-jeopardizes-vulnerable-women-children-and-communities-wor> [https://perma.cc/74VA-22Q4].

71. *The Mexico City Policy: An Explainer*, *supra* note 3; Wildman, *supra* note 36.

72. *The Mexico City Policy: An Explainer*, *supra* note 3.

73. MARIE STOPES INTERNATIONAL, <https://mariestopes.org/> [https://perma.cc/4F5M-D3WK].

74. *The Global Gag Rule: A world without choice*, MARIE STOPES INTERNATIONAL, <https://www.mariestopes.org/what-we-do/our-approach/policy-and-advocacy/the-mexico-city-policy-a-world-without-choice/> [https://perma.cc/U3LK-SU48].

75. Wildman, *supra* note 36.

safe abortions.⁷⁶ The GGR neither “protects life” nor results in fewer abortions.

III. Futile Legal and Congressional Attempts to Challenge the Global Gag Rule

The Mexico City Policy, despite its lasting power, has been subject to numerous legal challenges over the years. Unfortunately, as subsection (A) details, these legal challenges were felled for various procedural and substantive reasons. Subsection (B) will examine more recent developments outside of the judicial branch that, while noble in purpose, have fallen victim to the increasingly partisan divide that governs votes.

A. Legal Challenges to the Global Gag Rule

This section details the various unsuccessful legal challenges that have been raised against the Global Gag Rule. Subsection (1) illustrates the immense procedural hurdle that standing poses to both foreign and domestic NGOs. Then, subsection (2) details two cases, that despite overcoming the standing hurdle, were nonetheless struck down on substantive grounds.

1. Standing Issues for Foreign NGOs and Domestic NGOs Alike

The Mexico City Policy underwent its first judicial challenge in the 1989 case *DKT Memorial Fund Ltd. v. USAID*.⁷⁷ The D.C. Circuit found that although the blanket limitation of funds to foreign NGOs that counsel or provide abortions violated NGO’s First Amendment rights, “nonresident aliens acting beyond the borders and control of the United States government were not within the zones of interests protected by our First Amendment and therefore personally lacked standing.”⁷⁸ Essentially, the court ruled that foreign NGOs had no standing to bring a First Amendment claim to the government.

In the 2001 case *Center for Reproductive Law v. Bush*, the plaintiffs brought claims that the Mexico City Policy violated their First Amendment rights, Due Process rights, and Equal Protection under the Fifth Amendment.⁷⁹ The district court dismissed the action entirely be-

76. *Id.*

77. 887 F.2d 275 (D.C. Cir. 1989).

78. *Id.* at 283.

79. *Ctr. for Reprod. Law & Policy v. Bush*, No. 01 CIV. 4986 (LAP), 2001 WL 868007, at *2 (S.D.N.Y. July 31, 2001).

cause the plaintiffs lacked standing. The court noted that the challenged policy applied only to foreign NGOs, not to domestic organizations such as the plaintiffs. The court applied the three-prong test from *Lujan v. Defenders of Wildlife* and found that plaintiffs failed to demonstrate that they suffered (1) concrete injury in fact, (2) a causal connection between the alleged injury and government conduct, and (3) that a favorable decision could redress the alleged injury.⁸⁰ Later judicial challenges to the GGR presented substantive hurdles.

2. Constitutional Challenges that Had Standing, but Failed Nonetheless

a. *Planned Parenthood v. Agency for International Development*

In 1990, Planned Parenthood and similarly situated plaintiffs challenged the GGR on two constitutional grounds.⁸¹ In this case, Planned Parenthood surpassed the standing hurdle by claiming that the “Standard Provision to be Used in Grants and Cooperative Agreements with U.S. Nongovernmental Organizations” (“the Standard Provision”)⁸² violated its First Amendment rights to speech, privacy, and association by providing foreign NGOs a financial incentive to abstain from participating with Planned Parenthood in abortion-related activities.⁸³ Additionally, Planned Parenthood contended that the policy imposed “unconstitutional conditions on an important government benefit by requiring it to enforce restrictions on speech in order to participate as a conduit for USAID funds to foreign NGOs.”⁸⁴ Plaintiff Sosamma Lindsay sued individually, arguing that the policy violated her right to free speech by depriving her of the opportunity to teach about family planning issues and the availability and benefits of abortion, as the foreign university she worked for would be bound by the policy.⁸⁵ Plaintiff Jane Doe also sued individually, arguing that the Standard Provision restricted her and others from receiving accurate abortion information from foreign organizations that receive USAID funding, which interfered with her right to make decisions about con-

80. *Id.* at *8–12 (The plaintiffs had claimed that their injury was that GGR impacted their ability to lobby on behalf of foreign NGOs, but the court disagreed, stating that none of the funds impacted by the policy were connected to the plaintiffs lobbying efforts.).

81. *Planned Parenthood Fed’n of Am., Inc. v. Agency for Int’l Dev.*, No 87 CIV 0248 (JMW), 1990 WL 26306, at *4 (S.D.N.Y. Mar. 7, 1990).

82. *Planned Parenthood Fed’n of Am., Inc. v. Agency for Int’l Dev.*, 915 F.2d 59, 61 (2d Cir. 1990).

83. *Id.* at 62.

84. *Id.*

85. *Id.*

trapection and childbearing.⁸⁶ The district court ruled in favor of the defendant, and the plaintiffs sought appeal.⁸⁷

The Second Circuit reviewed the case in the same year. The Court of Appeals upheld the district court's decision that USAID chose the least restrictive means to implement the policy, and that a legislature's "decision not to subsidize the exercise of a fundamental right does not infringe the right."⁸⁸ The court further affirmed the district court's reasoning that even assuming *arguendo* that the Standard Provision interferes with the plaintiffs' speech and associational rights, regulation of foreign affairs is still a valid, constitutional power of the executive branch,⁸⁹ and that such a substantial and important governmental interest outweighs the plaintiffs-appellants' indirect and incidental infringements.⁹⁰

b. *Center for Reproductive Life and Policy v. Bush*

The Center for Reproductive Law and Policy ("CRLP") filed a suit similar to the 1990 *Planned Parenthood* case against the Bush administration in 2002. CRLP challenged the constitutionality of the Mexico City Policy, and the U.S. District Court for the Southern District of New York dismissed the case for lack of standing.⁹¹ The Second Circuit heard the case on appeal, and held that: (1) the Court of Appeals was not required to address the plaintiffs' First Amendment standing issue; (2) the policy did not violate the plaintiffs' First Amendment rights to free speech and association; (3) the plaintiffs lacked prudential standing to assert a due process claim; and (4) the plaintiffs had constitutional standing to assert an equal protection claim; but (5) the policy did not violate plaintiffs' equal protection rights.⁹²

CRLP asserted three main claims against the Bush administration. First, it contended that the Mexico City Policy violated its First Amendment rights to free speech and association.⁹³ CRLP claimed that the restrictive policy chilled foreign organizations from interacting and working with domestic abortion-rights groups, such as CRLP, thereby depriving it of its free speech and association rights in imple-

86. *Planned Parenthood Fed'n of Am.*, 1990 WL 26306, at *4.

87. *Planned Parenthood Fed'n of Am.*, 915 F.2d at 60.

88. *Id.* at 63, 65.

89. *Id.* at 65–66; *Planned Parenthood Fed'n of Am.*, 1990 WL 26306, at *5.

90. *Planned Parenthood Fed'n of Am.*, 915 F.2d at 65.

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

92. *Id.*

93. *Id.* at 189.

menting its global mission to engage reproductive law reform.⁹⁴ Second, CRLP claimed the policy violated its Equal Protection rights under the Fifth Amendment by restricting it from competing on “equal footing” with domestic anti-abortion groups.⁹⁵ Finally, CRLP claimed that the policy violated its Due Process rights because the policy did not clearly indicate what constituted prohibited speech or activity—CRLP posited that the policy encouraged arbitrary and discriminatory enforcement.⁹⁶ The Court of Appeals found that CLRP lacked standing to maintain a due process claim and rejected its claims for violations of the First Amendment and Equal Protection Clause.⁹⁷

In deciding the case, the Second Circuit relied on its reasoning in the 1990 *Planned Parenthood* decision, finding that the policy and the Standard Provision did not implicate constitutional rights.⁹⁸ The court reasoned that domestic organizations remained free to use independently-sourced funds to engage in abortion-related activities in foreign countries and that “[t]he harm alleged . . . is the result of choices made by foreign NGOs to take [US]AID’s money rather than engage in non-[US]AID funded cooperative efforts with the plaintiffs-appellants.”⁹⁹ The court opined that the effects on domestic NGOs’ activities were merely incidental, and did not rise to the level of a constitutional violation.¹⁰⁰ It further explained that the wisdom and motivation behind the policy were not justiciable issues.¹⁰¹ The court concluded that the Standard Provision did not preclude the plaintiffs-appellants from exercising their First Amendment rights, and found that the restrictions of the policy were rationally related to the “otherwise nonjusticiable decision limiting the class of beneficiaries of foreign aid.”¹⁰²

The court further rejected, as it did in *Planned Parenthood*, the plaintiffs’ notions of the impracticality of U.S. citizens’ and organizations’ engagement in abortion-related activities abroad without the cooperation of foreign organizations, and that the Standard Provision

94. *Id.* at 188.

95. *Id.*

96. *Id.*

97. *Ctr. for Reprod. Law & Policy*, 304 F.3d at 195–97.

98. *Id.* at 190 (citing *Planned Parenthood Fed’n of Am.*, 915 F.2d at 66).

99. *Id.* (citing *Planned Parenthood Fed’n of Am.*, 915 F.2d at 64).

100. *Id.*

101. *Id.* (citing *Planned Parenthood Fed’n of Am.*, 915 F.2d at 64–65).

102. *Id.*

deters “many of the most logical and effective foreign partners.”¹⁰³ However, the Second Circuit acknowledged that in *Planned Parenthood*, it did not describe the scope of the plaintiffs’ claim regarding the restrictions on their law reform advocacy to include advocacy both domestically and internationally, but that it nonetheless rejected that claim because the Standard Provision did not hinder the plaintiffs’ use of non-USAID funds in the United States or abroad.¹⁰⁴

B. Non-Judicial Challenges to Protecting Life in Global Health Assistance

In the aftermath of Trump’s passage of PLGHA, democratic members of the Senate and House attempted to pass legislation that would have both curtailed PLGHA’s impact and called for review of its implementation. However, such legislative efforts have fallen victim to partisan debate. Subsection (1) details the Global Health, Empowerment, and Rights (“HER”) Act that was introduced in January 2017, which would permanently end Trump’s Global Gag Rule, but still awaits committee review. Subsection (2) recounts the State Department’s purported six-month review of the PLGHA and its response to the Civil Society’s recommendations. Finally, subsection (3) reviews a proposed, but ultimately unsuccessful amendment to the State, Foreign Operations, and Related Programs budget that would have effectively overturned the GGR.

1. Global Health, Empowerment, and Rights Act

Senator Jeanne Shaheen, a New Hampshire Democrat, and Representative Nita Lowey, a New York Democrat, introduced the Global Health, Empowerment, and Rights Act to the Senate (S.210) and the House of Representatives (H.R.671) on January 24, 2017.¹⁰⁵ The Global HER Act would allow foreign organizations that receive U.S. aid to use non-U.S. funds for medical services that are legal in the United States, including safe abortion.¹⁰⁶ The bill would prevent certain restrictions on comprehensive reproductive healthcare and allow

103. *Ctr. for Reprod. Law & Policy*, 304 F.3d at 191 (citing *Planned Parenthood Fed’n of Am.*, 915 F.2d at 63–64; *Planned Parenthood Fed’n of Am.*, 1990 WL 26306, at *5).

104. *Id.* (citing *Planned Parenthood Fed’n of Am.*, 915 F.2d at 62; *Planned Parenthood Fed’n of Am.*, 1990 WL 26306, at *7).

105. *Global Health, Empowerment and Rights (HER) Act [S.210; H.R.671] Fact Sheet*, CTR. FOR HEALTH & GENDER EQUITY (June 2018), http://www.genderhealth.org/files/uploads/change/publications/Global_HER_Act_Fact_Sheet_July_2017_1.pdf [<https://perma.cc/DGP7-K7DL>].

106. *Id.*

foreign NGOs receiving U.S. aid to use non-U.S. funds to address the specific needs of their distinct populations, such as HIV treatment and prevention and maternal and child health, as long as such activities are legal in the United States.¹⁰⁷ The Global HER Act would ensure that U.S. foreign assistance promotes healthcare that prioritizes women's health by removing discriminatory restrictions on healthcare services and encouraging democratic participation, civic engagement, and free speech internationally.¹⁰⁸

While community members' co-sponsorship of S.210 or H.R.671 is imperative for advocacy of the Global HER Act,¹⁰⁹ realistically, the bills may never reach the House or Senate floor. With Republicans controlling Congress¹¹⁰ and the White House, and only two Republican Senators and zero House Representative cosponsors,¹¹¹ the odds of the Global HER Act passing are slim. As of December 2018, both bills have yet to be voted on in committee.¹¹² Considering that the bills were introduced early in the 2017–2018 legislative session¹¹³ and have yet to reach either house's floor for debate with less than a month remaining in the session, it appears the bills are destined to die in committee.

2. The State Department's Six Month Review of PLGHA was Simultaneously Insufficient and Unresponsive

The State Department made the following statement on May 15, 2017:

Given the expansive nature of the new policy, the Department will undertake a thorough and comprehensive review of the effectiveness and impact of the policy's application over the next six months, which could include identifying implementation issues, and any other new information affecting implementation going forward. Newly covered programs, including PEPFAR, the Presi-

107. *Id.*

108. *Id.*

109. *Id.*

110. The Republicans remain in control of both of houses of Congress through the end of 2018. The Democrats will take control of the House in January 2019.

111. *Id.*

112. Global Health, Empowerment and Rights Act, S. 210, 115th Cong. (2017) (referred to the S. Comm. on Foreign Relations); HER Act, H.R. 671, 115th Cong. (2017) (referred to the H. Comm. on Foreign Affairs).

113. *Global Health, Empowerment and Rights (HER) Act [S.210; H.R.671] Fact Sheet, supra* note 105.

dent's Malaria Initiative, and other global health programs, will be given special attention under this review.¹¹⁴

The Global Health Council promulgated Civil Society Recommendations ("the Recommendations") that urged the State Department to conduct annual reviews of the policy to ascertain its impacts and health outcomes. The purpose of the Recommendations was to make appropriate changes to the policy to mitigate implementation problems and harmful effects.¹¹⁵ Over 100 organizations signed on to the Recommendations to intensify pressure on the State Department to measure the impacts of PLGHA.¹¹⁶ The Recommendations demanded that the State Department's annual reviews be comprehensive, transparent, consultative, and action-oriented so that they can be meaningful.¹¹⁷ They also called on the State Department to pay particular attention to whether the policy disproportionately impacts certain populations.¹¹⁸ Specifically, the Recommendations called on the State Department to examine the impact of the policy based on population, geography, intervention, and type of organization.¹¹⁹

Unfortunately, the State Department's review was woefully insufficient and incomplete, as it failed to take note of any of the aforementioned recommendations.¹²⁰ In particular, the State Department did not heed the Recommendations' request that reviews be ongoing; rather, the review was conducted before many grants, including PEPFAR, had been made.¹²¹ The resulting review painted an incomplete picture of PLGHA's impact on both the amount of funds that had been curtailed, as well as the organizations that would be impacted.¹²² Although the State Department has committed to producing another analysis on December 15, 2018,¹²³ in light of this administration's adamant commitment to maintaining and expanding the GGR, any review of PLGHA's implementation is likely to be viewed through the lens of rose-colored glasses.

114. *Civil Society Recommendations for the 6-month Review of the Mexico City Policy*, GLOBAL HEALTH COUNCIL, <http://globalhealth.org/wp-content/uploads/CommunityStatementofPrinciplesforMCP6monthreview.pdf> [https://perma.cc/AWD6-VVZD].

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Mexico City Policy Six Month Review*, THE COALITION FOR CHILDREN AFFECTED BY AIDS (Feb. 9, 2018), <https://childrenandhiv.org/2018/02/09/mexico-city-policy-six-month-review/> [https://perma.cc/JPB7-5PWG].

121. *Id.*

122. *Id.*

123. *Id.*

3. Shaheen's Pro-Choice Rider to Senate Appropriations Bill Does Not Survive Consolidation in Both Houses

On September 7, 2017, the Senate Appropriations Committee voted 16-14 to support Senator Jeanne Shaheen's amendment to the State, Foreign Operations, and Related Programs budget (S.1780) that would repeal PLGHA.¹²⁴ Senator Shaheen reported that the amendment "will preserve and restore funding levels for international organizations that help to prevent over fifty million unintended pregnancies around the world, and reduce the number of maternal deaths we see from those accessing unsafe abortions when the lack of family planning leaves them without options."¹²⁵

While the amendment passed the committee in a close vote, Senator Shaheen expressed her doubts about the amendment's prospects for success in the House, stating that "the political dynamics are no longer in her favor in the appropriations process."¹²⁶ Without approval from the House, the measure could not be implemented into a final funding bill.¹²⁷ Ultimately, the consolidated version of the appropriations bill "continu[ed] all existing pro-life riders including the Hyde, Weldon, and Helms Amendments and prevent[ed] efforts to roll back the administration's expanded Mexico City policy," and as a result Senator Shaheen's amendment was cut.¹²⁸ The bill was signed into law on March 23, 2018,¹²⁹ "block[ing] attempts by the Democrats that would have tied the hands of the Trump Administration and forced them to continue funding for Planned Parenthood entities and

124. Lev Facher and Ike Swetlitz, *Senate panel votes to reverse Mexico City Policy, signaling support for global family-planning assistance*, STAT (Sept. 7, 2017), <https://www.statnews.com/2017/09/07/senate-mexico-city-family-planning/> [<https://perma.cc/L93J-DH27>]; S. 1780, 115th Cong. (2017).

125. Press Release, Jeanne Shaheen U.S. Senator of New Hampshire, Shaheen's Amendment That Repeals Global Gag Rule Added to Foreign Operations Funding Bill (Sept. 7, 2017), <https://www.shaheen.senate.gov/news/press/shaheens-amendment-that-repeals-global-gag-rule-added-to-foreign-operations-funding-bill-> [<https://perma.cc/FM54-XWME>].

126. *Repeal of Mexico City Policy Unlikely, Sen. Shaheen Says*, HENRY J. KAISER FAM. FOUND. (Mar. 9, 2018), <https://www.kff.org/news-summary/u-s-senate-repeal-of-mexico-city-policy-unlikely-sen-shaheen-says/> [<https://perma.cc/V3GM-2HSJ>].

127. See Adva Saldinger, *Senate committee backs reversal of Mexico City policy*, DEVEX (Sept. 8, 2017), <https://www.devex.com/news/senate-committee-backs-reversal-of-mexico-city-policy-90992> [<https://perma.cc/NWN2-YYW8>].

128. *House Amendment to the Senate Amendment to H.R.1625, Consolidated Appropriations Act, 2018*, REPUBLICAN POLICY COMMITTEE (Mar. 22, 2018), <https://policy.house.gov/legislative/bills/house-amendment-senate-amendment-hr1625-consolidated-appropriations-act-2018> [<https://perma.cc/FX2N-6LVQ>].

129. Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 348.

other controversial family planning grantees.”¹³⁰ Despite the initial optimism for the amendment after passing through committee, lack of consensus between the two houses ultimately led to its doom.

IV. An Argument for Extending the *Alliance* Decision

The unsuccessful legal challenges of the past and the impossibly slow legislative action of the present have been incapable of addressing the impact of the Global Gag Rule and have necessitated an unprecedented extension of the law. Subsection (A) will first illustrate how, in a different but analogous context, the Supreme Court has overruled a government provision for being an unconstitutional condition on a spending scheme. Then, subsection (B) will propose that a district court extend the Supreme Court’s reasoning to PLGHA.

A. 2013 Supreme Court Decision Rules that Conditioning Federal Funding upon the Adoption of a Belief Outside of Government Program is Unconstitutional

The Standard Provisions of PLGHA limit domestic NGOs’ freedom to fund foreign NGOs that “perform or actively promote” abortions. Because corporate spending is expressive conduct protected by the First Amendment, this limitation thereby violates domestic NGOs’ freedom of speech.¹³¹ According to the 2013 Supreme Court case *Agency for International Development v. Alliance for Open Society International, Inc.* (“*Alliance*”), such a violation is unconstitutional under the Unconstitutional Conditions Doctrine.¹³² The Unconstitutional Conditions Doctrine states that the government cannot condition a benefit on the requirement that a person forego a constitutional right or deny a benefit to a person for exercising a constitutional right.¹³³

In *Alliance*, as part of the 2003 Leadership Act, Congress appropriated billions of dollars to fund domestic NGO efforts to combat HIV/AIDS worldwide, on the condition that “(1) [n]o funds ‘may be used to promote or advocate the legalization or practice of prostitution,’ and (2) no funds may be used by an organization ‘that does not have a policy explicitly opposing prostitution’ (the “Policy Require-

130. *House Amendment to the Senate Amendment to H.R.1625, Consolidated Appropriations Act, 2018*, *supra* note 128.

131. *See* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 343 (2010) (Corporate spending is expressive conduct protected by the First Amendment.).

132. *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205, 205 (2013).

133. *See* *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013).

ment”).¹³⁴ Compliant recipients of Leadership Act funds were required to agree in the award document that they explicitly oppose “prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children.”¹³⁵ The issue before the court was whether the funding condition violated a recipient’s First Amendment rights.¹³⁶ The Supreme Court held that enforcement of the second condition of the Leadership Act violated First Amendment free speech protections “by compelling as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program.”¹³⁷

The Spending Clause of the Federal Constitution grants Congress broad discretion to tax and spend “for the general welfare,” which includes funding particular state programs or activities.¹³⁸ This power also includes the authority to limit the use of such funds to ensure that they are used in the way Congress intends.¹³⁹ Generally, if a party objects to a condition of federal funding, it can decline the funds.¹⁴⁰ The same recourse applies even when the condition affects the party’s First Amendment rights.¹⁴¹ However, the Supreme Court has held that the First Amendment limits Congress’ ability to condition the receipt of federal funding.¹⁴² Previous cases¹⁴³ make this distinction ambiguous, but in *Alliance*, Chief Justice Roberts clarified the distinction between “conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”¹⁴⁴ Essentially, the govern-

134. *Alliance*, 570 U.S. at 205.

135. 45 C.F.R. § 89.1(b) (2012); *Alliance*, 570 U.S. at 210.

136. *Alliance*, 570 U.S. at 208.

137. *Id.* at 205.

138. U.S. CONST. art. I, § 8, cl. 1.

139. *See id.*

140. *Alliance*, 570 U.S. at 214.

141. *Id.*

142. *See Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 59 (2006) (finding that a law that requires a federal department to deny federal funding to higher education institutions that restricted military representatives’ access to and assistance for purposes of recruiting violated the unconstitutional conditions doctrine because it forced the school to choose between giving up its First Amendment rights and forfeiting federal funding).

143. *See Regan v. Taxation with Representation*, 461 U.S. 540, 544–46 (1983) (rejecting the “notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State”); *see also Rust v. Sullivan*, 500 U.S. 173, 199–200 (1991); *but see FCC v. League of Women Voters*, 468 U.S. 364, 399–401 (1984).

144. *Alliance*, 570 U.S. at 214–15.

ment may not deny an organization a benefit or regulate speech that falls *outside* of a federal program as a condition of federal funding.

When the *Alliance* case was pending appeal, the Department of Health and Human Services and USAID issued guidelines on how recipients of Leadership Act funds could keep federal funding while working with affiliate organizations not bound by the Policy Requirement, as long as recipients retained “objective integrity and independence from any affiliated organization.”¹⁴⁵ Though the Government argued that such guidelines relieve any unconstitutional burden on recipients, the Court found that retaining such “objective independence” did not alleviate the unconstitutional burden on recipient’s First Amendment rights.¹⁴⁶ In other words, even with the guidelines, the Policy Requirement still violated recipients’ constitutional rights.

Chief Justice Roberts stated that the Policy Requirement of the Leadership Act went beyond its purpose of selecting funding recipients. Under the Policy Requirement, a recipient could not use Leadership Act funds and then assert a different or neutral belief about prostitution when participating in other activities “on its own time and dime.”¹⁴⁷ The Policy Requirement served as an “ongoing condition” that regulated recipients’ speech and activities, and created grounds for termination of funding if that organization violated it. Roberts opined that the Government’s purpose for the Policy Requirement was “to eradicate” prostitution and sex trafficking by seeking that its recipients adopt its position on the matter.¹⁴⁸ Accordingly, the Court found that the Policy Requirement compelled grant recipients to oppose prostitution as a condition of receiving federal funding, which consequently violated the recipients’ First Amendment rights. The Supreme Court held that such a coercive condition of federal funding constitutes a First Amendment violation, and was therefore unconstitutional.¹⁴⁹

B. PLGHA Violates Domestic NGOs’ First Amendment Free Speech Rights

Currently, for grants and cooperative agreements with domestic NGOs, the USAID Standard Provisions of PLGHA require that the domestic recipient of federal funds (the “recipient”):

145. *Id.* at 211.

146. *Id.* at 219–20.

147. *Id.* at 218.

148. *Id.*

149. *Id.* at 221.

(A) agrees that it will not furnish health assistance under this award to any foreign non-governmental organization that *performs or actively promotes abortion as a method of family planning* in foreign countries; and (B) further agrees to require that such sub-recipients do not provide financial support to any other foreign non-governmental organization that conducts such activities.¹⁵⁰

In other words, PLGHA applies to global health assistance to foreign NGOs, including those to which a domestic NGO makes a sub-award with federal funding. PLGHA deprives domestic NGOs' freedom to assist foreign NGOs that agree to PLGHA's terms.¹⁵¹ This means that if a foreign NGO accepts the terms of PLGHA, it cannot provide safe, comprehensive reproductive healthcare, and domestic NGOs are censored in relation to that organization. In practice, a foreign NGO's compliance with PLGHA would restrict domestic doctors from discussing abortion internationally, inhibit U.S. professors from teaching about reproductive healthcare in subrecipient countries, limit researchers' and scientists' international work towards HIV prevention—the examples are boundless. PLGHA effectively “gags” foreign NGOs who perform or actively promote abortion, in addition to domestic persons and entities that are constitutionally entitled to participate in such activities—domestically and abroad.

PLGHA is analogous to the Leadership Act in *Alliance*. There, the Supreme Court ruled that the second provision of the Leadership Act—requiring that no federal funds be used by an organization that does not have a policy opposing prostitution—was unconstitutional.¹⁵² The Court reasoned that coercing an organization to adopt a particular belief *that falls outside the contours of the federal program* upon the condition of receiving federal funding violates the First Amendment.¹⁵³ In *Alliance*, requiring organizations to adopt an anti-prostitution stance fell outside of the contours of the federal program designed to combat HIV/AIDS.¹⁵⁴ Similarly, as a condition of federal funding, PLGHA compels domestic NGOs to oppose abortion. The policy achieves this purpose by denying domestic organizations the benefit of federal funding if they, even on their own “time and dime,” support foreign NGOs that perform or actively promote abortions. This policy restriction reaches beyond the purpose of ensuring that

150. *Standard Provisions for Non-U.S. Nongovernmental Organizations*, *supra* note 45, at 90–91 (emphasis added).

151. *Protecting Life in Global Health Assistance*, *supra* note 1, at 1–2; *Understanding Trump's Global Gag Rule*, *supra* note 1.

152. *Alliance*, 570 U.S. at 220–21.

153. *Id.* at 214–15, 218.

154. *Id.*

U.S. taxpayer dollars do not support organizations that participate in coercive abortion or involuntary sterilization programs.¹⁵⁵ It expressly limits to which international organizations domestic recipients can provide health assistance and financial support. Like the *Alliance* Policy Requirement, PLGHA serves as an ongoing condition that regulates domestic recipients' independently-funded speech and activities related to abortion, and threatens terminating funding if there is a violation.

It is important to recognize that the Leadership Act's Policy Requirement obligated domestic NGOs to *expressly* oppose prostitution: "[t]o enforce the Policy Requirement, the agencies have directed that the recipient of any funding under the Act agree in the award document that it is opposed to prostitution and sex trafficking because of the psychological and physical risks they pose for women, men, and children;"¹⁵⁶ whereas compliance with PLGHA requires an implied rather than express statement. Domestic NGOs may not fund foreign NGOs that "perform or actively promote abortion as a method of family planning."¹⁵⁷ By not funding such organizations, domestic NGOs impliedly adopt an anti-abortion stance. The provision applies broadly to awards using federal funding for international health activities.¹⁵⁸ While domestic NGOs still have an option to advocate for abortion-related services via international funding, such speech is harshly limited by the government's threat to limit federal funding to domestic organizations that do so.

Through PLGHA, the Trump administration restricts domestic NGOs' First Amendment right to fund foreign organizations by limiting federal funding to domestic NGOs upon the condition that they impliedly adopt an anti-abortion stance by halting support to foreign NGOs that perform or actively promote abortion. This conditioning satisfies the Unconstitutional Conditions Doctrine and is a violation of the First Amendment.

Compliance with PLGHA effectively chills free speech rights of domestic NGOs that depend primarily on U.S. funding. Past implementation of the Global Gag Rule demonstrates this notion. In 2004, the Bush administration revoked \$360,000 in funding from a Global Health Council Conference, which it had previously supported for

155. The Mexico City Policy, 82 Fed. Reg. 8495.

156. 45 C.F.R. § 89.1(b) (2012); *Alliance*, 570 U.S. at 210.

157. *Protecting Life in Global Health Assistance*, *supra* note 1, at 7.

158. Wildman, *supra* note 36.

thirty years, simply because the administration learned that opponents of the Global Gag Rule would be discussing abortion.¹⁵⁹

The government's control over such organizations' dialogue creates a ripple effect that instills fear in persons working within such organizations in their individual capacities. Individuals from International Planned Parenthood Federation/Western Hemisphere Region ("IPPF/WHR") recalled "people having to sign in their contract that they would not talk about abortion, research on abortion. The rule didn't say that. But somehow in the implementation of things . . . no one wants to be held accountable and it's very unclear and it's highly political."¹⁶⁰ Additionally, the Senior Program Officer at Columbia University stated:

[I]n my review of anecdotal research on prior iterations of the global gag rule I was surprised to uncover, over and over again, how aid workers and providers were afraid to even use the word "abortion" in their work for fear of being reported and penalized . . . as if that alone was a violation of the rule that could lead to loss of funding.¹⁶¹

Seventeen years later, the political climate under the Trump administration is even more tense. Confusion regarding applicability and compliance of PLGHA forces individuals and organizations to over-interpret the policy, in fear of being found noncompliant.¹⁶² Further, the concern of PLGHA's impact and its consequences in the face of noncompliance is heightened with such an atypical president in office, combined with Supreme Court Justice Anthony Kennedy's retirement and the appointment of Brett Kavanaugh—who has worried pro-choice and women's rights advocates in a judicial decision in which he denied an undocumented minor in government custody from exercising her constitutional right to an abortion.¹⁶³ Such fear consequentially debilitates and narrows spaces where dialogue concerning safe, ethical, pro-choice methods of healthcare previously thrived, resulting in broader ideological and political repercussions.

159. *Prescribing Chaos in Global Health: The Global Gag Rule from 1984-2018*, CTR. FOR HEALTH & GENDER EQUITY 16 (June 2018), http://www.genderhealth.org/files/uploads/change/publications/Prescribing_Chaos_in_Global_Health_full_report.pdf [https://perma.cc/R78G-JP5L].

160. *Id.*

161. *Id.*

162. *See id.* at 32.

163. Amanda Arnold, *Brett Kavanaugh Poses a Serious Threat to Reproductive Rights*, THE CUT (July 9, 2018), <https://www.thecut.com/2018/07/brett-kavanaugh-supreme-court-abortion.html> [https://perma.cc/8XPU-B2YA].

Conclusion

Women's health is a human rights issue that cannot go ignored. Champions of human rights must join forces to abolish policies that limit women's access to healthcare, starting with the PLGHA. The Global Gag Rule in its previous implementations has resulted in concrete harms to free speech, advocacy, access to modern contraception, HIV and AIDS prevention efforts, maternal and newborn health, and safe, accessible abortion.

Trump's PLGHA is a roaring expansion of the Global Gag Rule that severely outdoes its implementations over the past six presidential administrations. Now, the expanded policy additionally affects federal funding for nutrition, infectious diseases, military forces, and more. The policy gags foreign NGOs from promoting and performing abortion and from providing integrated health systems that provide healthcare for HIV, AIDS, and family planning at a single clinic. By restricting U.S. foreign assistance to countries that even mention contraception or abortion, entire clinics are deprived of receiving foreign assistance, resulting in lost jobs, poorer families, unaddressed medical concerns, and death.

While individuals and organizational plaintiffs have attempted to challenge the Global Gag Rule as unconstitutional, such challenges have proved futile. Further, legislative attempts to overturn the policy are up for review. The Global HER Act would allow foreign NGOs to use non-U.S. funding to support reproductive healthcare—including safe abortion—that is legal in the U.S. and in the designated foreign country. Passage of the Global HER Act would banish discriminatory and harmful effects of PLGHA and increase access to necessary reproductive healthcare. However, partisanship in Congress hurts the Global HER Act's chances of passing, necessitating the need for judicial action through extension of the *Alliance* decision.

In *Alliance*, the government deemed a federal program that conditioned federal funding upon the adoption of a belief outside the contours of a government program unconstitutional. An appropriate plaintiff may challenge PLGHA by analogizing it to *Alliance*, as PLGHA compels domestic NGOs to oppose abortion by denying such organizations the benefit of federal funding if they, even on their own "time and dime," support foreign NGOs that perform or actively promote abortion. This restriction exceeds the scope of ensuring federal funds are not used for abortion referrals and services by inhibiting domestic NGOs' free speech rights by limiting to which international

organizations domestic recipients can provide health assistance and financial support.

Trump's "Protecting Life in Global Health Assistance" does nothing to protect human life. A successful legal challenge based on *Alliance* has potential to dismantle Trump's reckless policy. With the proper plaintiff, such a challenge would encourage a notion of global assistance without stigma, save the lives of women, children, and families internationally, and pave the way for a democratic society that refuses to compromise human rights.

