

The Bush Global Gag Rule

A Violation of International Human Rights

On January 22, 2001, President George W. Bush re-imposed a restriction — known as the “global gag rule” — on funding for international family planning provided through the U.S. Agency for International Development (USAID) population program. This provision restricts overseas non-governmental organizations (NGOs) that receive USAID family planning funds from using their own money to provide abortion services, to advocate for changes in abortion laws, or even to provide full and accurate medical information about legal abortion services to their patients. By stifling debate and the ability of foreign NGOs to lobby their governments, the global gag rule undermines their right to exercise freedom of speech. The global gag rule also erects barriers to the development of the democratic process in other countries, the promotion of civil society abroad, the enhancement of women’s participation, and the credibility of the United States in international settings, thus undermining bedrock U.S. foreign policy objectives. Furthermore, the restriction undermines U.S. commitments to women’s equality and reproductive rights. The global gag rule would be unconstitutional if directly applied to U.S.-based NGOs, and therefore creates a hypocritical double standard.

Table of Contents

I. Background	1
II. What Is the Bush Global Gag Rule?	3
A. Prohibited Activities	3
B. The Bush Global Gag Rule v. the FY 2000 Gag Rule	5
C. The Impact of the Global Gag Rule	5
III. The Global Gag Rule Undermines Freedom of Speech	8
A. Punishing Speech on Abortion	8
B. Violation of U.S. and International Human Rights Principles	9
IV. The Global Gag Rule Undermines U.S. Foreign Policy	11
A. Undermining U.S. Efforts to Promote Democracy and Freedom Abroad	11
B. Undermining Women’s Participation in Society	11
C. Undermining U.S. NGOs and Non-U.S. Government Donors	12
D. Undermining the Sovereignty of Foreign Governments	12
E. Undermining U.S. Credibility Abroad	13
V. The Global Gag Rule Undermines U.S. Commitments to Reproductive Rights	13
A. International Treaties and Conferences Recognizing Reproductive Rights	13
B. Liberalization of Abortion Laws	15
C. Harm to Women’s Reproductive Health	16
VI. The Global Gag Rule Would Be Unconstitutional if Applied to U.S. NGOs Receiving USAID Funds	18
A. Relevant Case Law	18
B. “Fungibility”	18
VII. Conclusion	19

I. Background

The United States has supported international family planning and population assistance since the 1960s. Congress amended the Foreign Assistance Act of 1961 (the “Foreign Assistance Act”) to authorize the president to provide funding for voluntary population planning,¹ stating that “poor health conditions and uncontrolled population growth can vitiate otherwise successful development efforts.”² The Foreign Assistance Act aims “to contribute to improvements in the health of the greatest number of poor people in developing countries.”³ In 1973, the Foreign Assistance Act was amended by a provision, known as the Helms Amendment, prohibiting the use of federal money “for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.”⁴ In addition, in 1974, USAID established its own policy, later codified, that prohibits U.S. funding for “information, education, training, or communication programs that seek to promote abortion as a method of family planning.”⁵ In 1984, the Reagan Administration imposed further restrictions on U.S. funding for international family planning.⁶ The so-called “Mexico City Policy”⁷—the predecessor to the current “global gag rule”—prohibited overseas NGOs from receiving U.S. funds if, with their own funds and in accordance with the laws of their own countries, they “performed” or “actively promoted” “abortion as a method of family planning.”⁸ Further, the Reagan Administration issued extremely restrictive regulations that interpreted the phrase “abortion as a method of family planning” to mean all abortions, except when performed in cases of rape, incest, or when the life (but not health) of the woman would be endangered if the fetus were carried to term.⁹ The Clinton Administration ended the Mexico City Policy in 1993.¹⁰

Since 1995, Congressional foes of family planning and abortion rights, led by Representative Chris Smith (R-NJ), have sought to add funding restrictions similar to the Mexico City Policy to foreign operations appropriations bills and to State Department reauthorization act. Representative Smith and his allies inappropriately and unconscionably held payment of U.S. arrears on U.N. dues hostage to versions of the global gag rule provision by attaching these as riders to the legislation authorizing payment of the U.N. arrears. President Clinton vetoed this legislation in 1998, but struck a “deal” in 1999 to accept the restriction in order to ensure payment of U.N. arrears, in large part because the United States’ ability to vote in the U.N. General Assembly was at stake. Thus, Representative Smith was finally successful in attaching these restrictions—a modified version of the global gag rule¹¹—to the fiscal year (FY) 2000 foreign operations appropriations bill that was enacted as part of the consolidated appropriations act.¹² This was the first time that Congress acted to make such restrictions statutory law (as opposed to the Mexico City Policy, which was an executive branch policy applied by USAID). The Clinton Administration caved into Representative Smith’s demands, but vowed that the FY 2000 global gag rule would only remain in effect for one year and would be eliminated in the FY 2001 appropriations process.

A Violation of International Human Rights

In practice, once a provision is written into an appropriations bill, which must be renewed every year, eliminating it in subsequent years has historically proven to be difficult. However, in the fall of 2000, President Clinton and pro-family planning members of Congress largely prevailed by successfully eliminating the global gag rule from the FY 2001 appropriations legislation. Unfortunately, release of the USAID family planning funding was delayed until February 15, 2001, allowing the new president (not yet known) to decide whether to re-impose the global gag rule as an administrative policy. President Bush did so on January 22, 2001,¹³ his first business day in office (and the 28th anniversary of *Roe v. Wade*, the landmark U.S. Supreme Court decision establishing a woman's right to an abortion).

II. What Is the Bush Global Gag Rule?

A. PROHIBITED ACTIVITIES

The Bush global gag rule forbids foreign NGOs receiving USAID assistance for family planning or reproductive health services from using their own, non-U.S. money to “perform or actively promote abortion as a method of family planning in USAID-recipient countries or provide financial support to any other foreign nongovernmental organization that conducts such activities.”¹⁴ The phrase “abortion as a method of family planning” is so broadly defined that it prohibits nearly all abortions, including an explicit ban on all “abortions performed for the physical or mental health of the mother.”¹⁵ Also explicitly banned are the following:

- (I) Operating a family planning counseling service that includes, as part of the regular program, providing advice and information regarding the benefits and availability of abortion as a method of family planning;
- (II) Providing advice that abortion is an available option in the event other methods of family planning are not used or are not successful or encouraging women to consider abortion...;
- (III) Lobbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning; and
- (IV) Conducting a public information campaign in USAID-recipient countries regarding the benefits and/or availability of abortion as a method of family planning.¹⁶

Simply put, the global gag rule, with limited exceptions, prohibits foreign NGOs from using their own funds to provide full and accurate information about all legal medical options to female patients, perform legal abortions, or lobby their own governments for abortion law reform. The 1973 Helms Amendment already prohibits U.S. funds from being used for these activities.¹⁷

An estimated 78,000 women die each year all over the world, and millions more are injured, from unsafe abortions. Such tragedies could be virtually eliminated by the provision of appropriate health information and services and law reform efforts to ensure access to safe and legal abortions. The global gag rule infringes upon international human rights, such as freedom of speech and participation in the national democratic process, as well as the rights to health and reproductive self-determination. Through the global gag rule, the U.S. government not only stifles free speech, but also affirmatively discriminates against a particular viewpoint that it does not like, setting dangerous precedent. The global gag rule forces health care organizations to make an immoral choice: either give up desperately needed funds for family planning and other reproductive health care services, or give up their right to free speech and to provide patients with full and accurate medical information.

B. THE BUSH GLOBAL GAG RULE V. THE FY 2000 GAG RULE

The Bush global gag rule differs from the modified version of the global gag rule imposed on FY 2000 funds in several respects. For example, the Bush policy goes well beyond the FY 2000 policy by prohibiting overseas groups from counseling pregnant women on all of their pregnancy options, including safe abortion where it is legal. Without complete and accurate information, the restriction makes informed decision-making on the part of a pregnant woman impossible—a situation that is strikingly unethical.¹⁸ The imposition of a gag rule on the U.S. domestic family planning program was debated by the federal government and throughout the country in the late 1980s and early 1990s. Professional medical associations, including the American Medical Association, American College of Obstetricians and Gynecologists, and American Nursing Association, universally opposed this type of restriction as directly conflicting with the obligations of medical practitioners.¹⁹ Punishing communication between female patients and their physicians is tantamount to exporting malpractice.²⁰ The American Bar Association (ABA) has also taken a strong stance against any such domestic gag rule.²¹ The findings of the report accompanying the ABA policy opposing the domestic gag rule illuminate the threat to medical ethics posed by the global gag rule:

It is clear that, to one seeking either legal or medical counsel, incomplete advice can be worse than no advice at all, misleading consumers into believing that they are receiving all of the information necessary to make informed choices, when in fact the advice is skewed toward a particular viewpoint. In a doctor's office, the prohibition imposed upon the health care professional against supplying complete information may actually be life-threatening.²²

Another important distinction between the Bush policy and the FY 2000 policy is that the Bush global gag rule discriminatorily bans abortion-related advocacy only by pro-choice organizations, whereas the FY 2000 policy uniformly prohibited abortion-related lobbying on both sides of the debate. The Bush version bars advocacy aimed at decriminalizing abortions and making them more safe, legal and accessible; groups that engage in anti-abortion advocacy bear no penalty and receive implicit endorsement

A Violation of International Human Rights

from the United States government. Punishing the right to freedom of expression and freedom to petition one's government—regardless of viewpoint—is antidemocratic. Removing one side from the debate is hypocritical, and only serves to export President Bush's anti-choice stance.²³

C. THE IMPACT OF THE GLOBAL GAG RULE

Of the 40 to 60 million abortions that take place annually, at least 20 million are performed under unsafe, illegal conditions and up to 50% of these women require follow-up gynecological care. Millions suffer permanent physical injuries, and at least 78,000 women die. Most of these deaths are preventable, and occur in countries where access to abortion is highly restricted or illegal altogether. The U.S. government is complicit in these preventable injuries and deaths due to President Bush's decision to reinstate the global gag rule. The following are examples of the impact that the global gag rule is having around the world.

Nepal: Nepal has one of the highest maternal mortality rates in South Asia: 539 women in 100,000 die from pregnancy-related complications (as compared to 7 in 100,000 in the United States). Half of these deaths are caused by unsafe abortion.²⁴ On September 26, 2002, however, the King of Nepal signed a historic law that legalized abortion on broad grounds.

Despite the landmark reform of the abortion law, safe abortion services will remain out of reach for many women in Nepal, particularly rural and low-income women. The Bush Administration's global gag rule will pose an added barrier to ensuring abortion access. The global gag rule will prevent the organizations that receive U.S. family planning assistance from providing or advocating for any abortion-related services. These organizations also will not be able to provide counseling or referrals for women to obtain abortion services elsewhere. To provide safe abortion services, these organizations would have to risk bankruptcy and forego U.S. family planning assistance—the largest source of such foreign aid in Nepal.²⁵

Zimbabwe: A major provider of family planning information and services in Zimbabwe is a recipient of U.S. population funds. The organization's director privately expressed concern regarding the high number of unsafe abortions being performed in Zimbabwe, and indicated he felt that liberalization of Zimbabwe's abortion laws would result in fewer abortion-related deaths. Under Zimbabwe law, abortion is available only when necessitated by a threat to women's physical health, but abortions are virtually unavailable without the means to pay. Yet when interviewed for a newspaper article about the subject, the provider stated that his organization did not support the idea of legalizing abortion. Although service providers express concern about unsafe abortions off-the-record, those receiving U.S. funds are publicly gagged, which prevents them from openly discussing their experiences treating complications of illegal abortion and testifying to policy makers about whether abortion laws should be changed.²⁶

Bolivia: Abortion is illegal in Bolivia, except when the pregnancy is the result of rape or incest or when the life of the woman is at stake—a provision acted upon only twice in the law’s 29-year existence. Consequently, unsafe and illegal abortions are resorted to by large numbers of Bolivian women, contributing to the highest maternal mortality rate in Latin America: 390 women in 100,000 die from pregnancy-related complications (again, as compared to 7 in 100,000 in United States). In an attempt to liberalize the abortion law, NGOs formed a coalition to lobby the government and raise awareness about this public health crisis. As a result of the global gag rule, several organizations were forced to end their involvement in the campaign.²⁷

One woman dies each day in Bolivia from the complications of an unsafe abortion. Half of the beds in gynecology wards of State and Social Security hospitals are occupied by women suffering the consequences of unsafe, clandestine abortions. Reinforcing clandestinity through silence [imposed by compliance with the global gag rule] would make us accomplices to the continuation of this grave public health and rights issue, which contributes one third of Bolivia’s unacceptably high maternal mortality rate. – Jaime Miguel Telleria, executive director, CISTAC²⁸

CISTAC refused to certify compliance to the FY 2000 global gag rule and lost a quarter of its \$200,000 budget reportedly due to fallout from the global gag rule, thus seriously compromising its efforts to educate men and women about their sexual and reproductive health and rights.²⁹

Senegal: Under Senegalese law, abortion is permitted only to save a woman’s life.

[T]he Global Gag Rule would mean that many women, particularly adolescents, could die. Let me tell you about our rural areas. Because jobs can be scarce in the countryside, many men have to leave their wives to find work.... Many young wives left behind have become pregnant by other men.... Contraceptive prevalence is extremely low due to cultural and religious factors, so that is why these unwanted pregnancies are so high. Once they are pregnant, they are stigmatized and ostracized by the other villagers. So, many of these desperate young women will inject pomegranate juice into their vaginas and uteruses to induce abortion. They don’t realize how potent and dangerous the juice is, and they get badly burned inside. Women die as a result. The “lucky” ones are forced to have hysterectomies.

I think that the Global Gag Rule is short-sighted—created by people sitting in Washington, DC who cannot see the implications for women in the rest of the world. If it becomes taboo to talk about abortion, which is legal in our country in some circumstances but resorted to in unsafe conditions by large numbers of women anyway, abortion will slip even further underground with disastrous implications for women. – Codou Bop, executive director, Groupe de recherche femmes et lois au Sénégal³⁰

Peru: In Peru, abortion is illegal in most circumstances, unless necessitated by a severe threat to women’s physical health. Even then it is nearly impossible for low-income

A Violation of International Human Rights

women to access safe abortion services. NGOs receiving U.S. aid are so afraid of losing this funding that they avoid all association with abortion. Last fall, the executive director of a U.S.-funded women's rights organization from Peru was invited to Washington, D.C., to speak with the media and U.S. policy makers on the negative effects of the global gag rule in her country. However, she would only speak about the policy's infringement upon free speech and association, declining to discuss the issue of abortion and its impact on women in Peru. She later revealed she feared that publicly discussing abortion— even in America, when asked directly in closed meetings with U.S. government officials— would jeopardize her U.S. funding, which is critical to her organization's efforts to provide desperately poor women access to family planning and other reproductive health information and services.³¹

III. The Global Gag Rule Undermines Freedom of Speech

The global gag rule undermines the right to freedom of speech—a universal human right, highly valued and protected in the United States. This policy violates freedom of expression by preventing overseas reproductive health and advocacy organizations from speaking out and lobbying their own governments on their own countries' abortion laws or policies. The global gag rule censors health-care professionals in overseas family planning clinics, depriving them of the ability to provide full and accurate information to their patients.³² It prohibits foreign NGOs involved in advocacy and/or health service provision from communicating with their governments in order to decriminalize or improve the safety of and access to abortion,³³ and prohibits public education campaigns about abortion.³⁴ The global gag rule is the epitome of viewpoint-based discrimination, because it does not constrain organizations working to oppose legal, safe and accessible abortion. The global gag rule also undermines the free speech rights of human rights advocates.

A. PUNISHING SPEECH ON ABORTION

If a foreign reproductive health organization refuses to compromise its right to freedom of expression, the organization is denied all U.S. family planning funding. In effect, the global gag rule holds this basic human right hostage by denying organizations vital resources for family planning and other reproductive health services. The U.S. government has only directly imposed this restriction on foreign organizations, which do not receive protection under the U.S. Constitution.³⁵ Therefore, the global gag rule imposes a hypocritical double standard—denying freedom of expression to foreign organizations while ostensibly not imposing those restraints on U.S. organizations.

Examples of limitations on foreign organizations' freedom of speech include:

- Lawyers and activists have successfully reformed Nepal's abortion law—once one of the world's harshest. In a country where women die in large numbers from unsafe abortions and hundreds have been prosecuted and remain in prison for

abortion, NGO reproductive health-care providers—many of whom are U.S.-funded—cannot lobby the government of Nepal to provide safe and accessible abortion services.

- U.S.-funded NGOs in Russia, where most abortions are legal, cannot meet with governmental officials to discuss their concerns regarding the negative health impact of a proposed restrictive abortion law in Russia.
- Doctors in health-care organizations receiving U.S. family planning assistance in Bolivia, where abortion is legal to protect a woman's physical health, cannot inform a woman whose health is severely compromised by a pregnancy that legal abortion is an available option. In addition, doctors cannot refer women needing assistance to clinics where safe abortion procedures are available to prevent severe health consequences.
- Health-care organizations in South Africa cannot engage in public education programs about HIV/AIDS that include the availability of safe and legal abortion as an option for HIV-infected pregnant women.

However, anti-choice groups are not gagged under this one-sided policy, and are free to lobby their governments to make abortion laws more severe, and even criminal, while receiving U.S. aid.³⁶

B. VIOLATION OF U.S. AND INTERNATIONAL HUMAN RIGHTS PRINCIPLES

Freedom of speech is cherished as one of the cornerstones of democracy—a fundamental liberty essential to the responsible exercise of U.S. citizenship. Moreover, through its foreign policy, the United States has a long history of protecting the right of individuals and groups to speak freely and to participate in their countries' democratic processes. By imposing the global gag rule, the United States government violates basic principles enshrined in international human rights instruments, including the Universal Declaration on Human Rights and the International Convention on Civil and Political Rights, as well as various instruments of the inter-American system.

Freedom of speech and democratic participation are protected in the First Amendment to the U.S. Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

With strong leadership by the United States, the right to free speech is also enshrined in numerous, widely accepted international human rights instruments.³⁷ For example, the Universal Declaration, drafted in part by U.S. delegate Eleanor Roosevelt and adopted by the United Nations in 1948, proclaims the human right to freedom of speech and democratic participation:

A Violation of International Human Rights

[T]he advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people...³⁸

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.³⁹

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.⁴⁰

Additionally, the United States and 145 other countries, have ratified the International Covenant on Civil and Political Rights (Civil and Political Rights Covenant)⁴¹ that says:

Everyone shall have the right to hold opinions without interference... Everyone shall have the right to freedom of expression; this right shall include the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print...⁴²

Under particular pressure from the United States, the inter-American system has a long history of protecting the right of individuals and groups to speak freely and to participate in their countries' democratic processes. These rights have been enshrined in human rights instruments such as the American Convention on Human Rights;⁴³ the American Declaration of the Rights and Duties of Man;⁴⁴ and the Inter-American Declaration of Principles on Freedom of Expression.⁴⁵ The global gag rule violates several basic principles articulated in those documents, such as the right to seek, receive and impart information and the right to freedom of expression.⁴⁶ During the recent Summit of the Americas, member nations agreed in the Summit's Plan of Action to "[c]ontinue to support the work of the inter-American human rights system in the area of freedom of expression through the Special Rapporteur for Freedom of Expression of the IACHR [Inter-American Commission on Human Rights] ... and seek to ensure that national legislation on freedom of expression is consistent with international legal obligations."⁴⁷ The U.S. government agreed to this principle and should reverse the violations of freedom of expression caused by the global gag rule.

President Bush is turning back the clock on women and organizations promoting women's health through restrictions set forth in the global gag rule. Mr. Bush is attempting to dictate speech on abortion law reform in low-income countries, such that the only permissible governmental response to abortion is punishment, and even incarceration. The global gag rule violates the letter and spirit of vital human rights documents by preventing overseas organizations, that depend upon U.S. funds to provide desperately needed reproductive health-care services, from exercising their internationally recognized right to express opinions. It denies reproductive health organizations the right to simply talk about abortion to patients and to participate in their nations' public policy discussions, including debate about legal and policy reforms. The global gag rule is a clear violation of the international human right to freedom of expression, and the United States should be held accountable for this imposition of censorship.

IV. The Global Gag Rule Undermines U.S. Foreign Policy

A. UNDERMINING U.S. EFFORTS TO PROMOTE DEMOCRACY AND FREEDOM ABROAD

The global gag rule conflicts with primary U.S. foreign policy goals—the promotion of democratic participation, the building of civil society, and the enhancement of the status of women within democracies. A principal objective of U.S. foreign policy is to assist “developing countries in their efforts to acquire the knowledge and resources essential to development and to build the economic, political, and social institutions, which will improve the quality of their lives.”⁴⁸ A number of legislative initiatives have specifically furthered this goal. These include, in particular, legislative provisions in which Congress has expressed its preference for the furtherance of development goals through the private sector⁴⁹ and through “activities planned and carried out by private and voluntary organizations and cooperatives.”⁵⁰

As USAID has articulated in implementing this congressional mandate, the “creation and involvement of indigenous NGOs—intermediary organizations that enhance popular participation that deepen the benefits to society, and whose very existence can promote peaceful change,” is essential to the resolution of development problems and the creation of self-sustaining, civic societies.⁵¹ Thus, empowering overseas NGOs to participate freely in their societies to foster democracy is clearly a central tenet of U.S. foreign policy. However, the global gag rule financially penalizes NGOs that participate in the democratic process with their own funds on issues related to abortion.

In the United States, abortion sparks a great deal of political debate. However, President Bush is arrogantly repressing public discourse on abortion in other countries—blatantly promoting only one side of the debate. On other issues, the United States encourages citizens of other countries to engage in public debate and to resolve their differences through the democratic political process. It is unwise to reverse this foreign policy of encouraging democratic participation and to prohibit citizens from utilizing the public forum to resolve such divisive issues.

B. UNDERMINING WOMEN'S PARTICIPATION IN SOCIETY

Through foreign assistance, the United States has helped improve the status of women, including their role as participants in democratic decision-making. Numerous provisions of U.S. foreign assistance legislation, including those which set forth the principle purpose of bilateral development assistance, require the United States to support the enhancement of women's status and participation in civil society.⁵² In 1974, USAID established the Women in Development office “to help ensure that women participate fully, and benefit equally, from U.S. overseas development assistance.”⁵³ USAID announced the Women's Legal Rights Initiative at the Fourth World Conference on

A Violation of International Human Rights

Women in Beijing, China, in 1995 and emphasized the need to ensure women's legal status and promote their participation in social and economic life.⁵⁴

The global gag rule disproportionately impacts women's groups, many of which receive funding from USAID for projects related to reproductive health care, maternal and child survival, and voluntary family planning. These groups, as the "front line" of the women's health movement, observe firsthand the effects of illegal, unsafe abortion and are often called upon to participate in their countries' deliberations about abortion law reform. If the United States is committed to decreasing women's marginalization, it should eliminate the global gag rule, which undermines women's rights to reproductive self-determination and to question their countries' abortion laws. The United States cannot have it both ways—supporting women with one hand and silencing them with the other. It is imperialistic and hypocritical for the United States, a country where women have the right to obtain information about safe, legal abortion in most circumstances, to "gag" women and women's organizations abroad.

C. UNDERMINING U.S. NGOS AND NON-U.S. GOVERNMENT DONORS

USAID international family planning programs are often undertaken through U.S.-based NGOs, which build partnerships and programs with local NGOs overseas. The trust and teamwork necessary for effective partnership is built gradually over years of working together. However, the double standard created by the global gag rule regarding U.S.-based NGOs—which are not directly implicated by the global gag rule—and overseas NGOs—which are directly implicated—results in unequal and unfair treatment and is likely to lead to resentment by overseas NGOs. This is especially true because the U.S.-based NGOs are being required under the global gag rule to assist in its enforcement by requesting foreign NGOs to agree to contractual provisions giving up their right to engage in certain abortion-related activities.

The global gag rule also impacts international assistance provided by other donor countries (e.g., the European Union countries, many of which have publicly opposed the global gag rule⁵⁵), UN agencies, and foundations and other private funders. For example, foreign NGOs may be deterred from undertaking programs to provide legal abortion services or to lobby their governments to make legal abortions safer—programs that would have been sponsored by such funders—so that the NGOs do not jeopardize their USAID family planning funding. Furthermore, U.S.-based NGOs that receive USAID funding for international family planning and work with foreign NGOs may have problems seeking matching funds from other donors for these programs, as those donors may resist having their grants "federalized," i.e., subjected, in effect, to the global gag rule.

D. UNDERMINING THE SOVEREIGNTY OF FOREIGN GOVERNMENTS

U.S. policy makers have long recognized, with respect to aid to foreign governments, that sovereign countries are entitled to spend non-U.S. funds on abortion-related activities. It would be folly for the United States to cease funding family planning activities in a particular country based on that government's abortion views.⁵⁶ However, the

national reproductive health policies of foreign governments within their own borders could be compromised by the global gag rule. Foreign governments are not able to collaborate with their own domestic NGOs on abortion-related projects, because the NGOs have been required by the U.S. government to give up their right to do so. Furthermore, the global gag rule will prevent NGOs from carrying out their governments' public policy decisions in countries where governments have determined that abortions should be legal, safe and accessible. This U.S. interference with the reproductive health policy decisions of foreign countries is an infringement of their national sovereignty and directly contravenes international legal principles.⁵⁷

E. UNDERMINING U.S. CREDIBILITY ABROAD

The global gag rule causes foreign NGOs, and others, in foreign countries to scorn the United States for imposing restrictions on their right to democratic participation, free speech and reproductive self-determination.⁵⁸ Foreign women's groups are ostracizing foreign NGOs who cave in to USAID's global gag rule requirement in order to obtain funding. The global gag rule only serves to foster anti-American sentiments, particularly related to U.S. foreign assistance programs around the world. A heightened anti-U.S. climate around the world only hampers the ability of the U.S. government to maintain its leadership role in international settings.

V. The Global Gag Rule Undermines U.S. Commitments to Reproductive Rights

The global gag rule violates the right to health, including reproductive health, the right freely and responsibly to determine the number and spacing of one's children, and the right to reproductive self-determination. The global gag rule's restrictions on access to health care and family planning stand in sharp contrast to long-standing U.S. policy at home and abroad. The United States has a proud history of promoting women's reproductive health, as well as the right to freedom of speech and democratic participation. Strong leadership by the U.S. government has ensured the inclusion of these principles in numerous, widely accepted international human rights instruments.

A. INTERNATIONAL TREATIES AND CONFERENCES RECOGNIZING REPRODUCTIVE RIGHTS

Reproductive rights derive from the right to health, including family planning, and the right to reproductive self-determination. Various treaties establish reproductive rights as human rights under international law.⁵⁹ For example, women's rights to health and family planning are addressed in the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, which has been signed by the United States and ratified by more than 165 countries.⁶⁰ Documents adopted at recent UN conferences also reaffirm women's reproductive rights, and although they are not binding under international law, they embody globally accepted norms and standards, as well as customary international law. These conferences include the International Conference on

A Violation of International Human Rights

Population and Development in Cairo in 1994,⁶¹ the Beijing Conference,⁶² and their five-year reviews.⁶³

The global gag rule violates several internationally recognized principles regarding reproductive health, family planning and unsafe abortion articulated during these international conferences. For example, it restrains the ability of overseas NGOs to “deal with the health impact of unsafe abortion as a major public health concern,”⁶⁴ since overseas NGOs receiving USAID funds are prohibited from lobbying their governments to alter abortion laws to reduce unsafe abortion and to make legal abortion safer. By gagging organizations with the greatest expertise on reproductive health from participating in dialogue concerning abortion legislation and policy, the global gag rule severely diminishes the likelihood that women in the countries, in which USAID provides funding, will have access to safe, legal abortion.

The international pledge to ensure the provision of “[p]ost-abortion counseling, education and family planning services ... promptly, which will also help to avoid repeat abortions,”⁶⁵ is also inhibited, because the global gag rule mandates the segregation of abortion services from family planning services. The global gag rule restrains overseas NGOs’ ability to “reduce the recourse to abortion through expanded and improved family planning services,”⁶⁶ because it forces a separation of family planning services from abortion services, thus denying family planning services to women who have unwanted pregnancies.

The international agreements also provide that where abortion is legal, “health systems should train and equip health service providers and should take other measures to ensure that such abortion is safe and accessible. Additional measures should be taken to safeguard women’s health.”⁶⁷ The global gag rule undermines efforts to make legal abortion more accessible and undermines training of health providers by restricting foreign NGOs from using their own funds to implement these mandates. Therefore, collaboration between foreign governments and foreign NGOs to implement these mandates is less likely. Several international documents also recommend that governments should review abortion laws penalizing women.⁶⁸ The global gag rule contravenes this provision by prohibiting organizations from working to decriminalize abortion and allowing U.S. assistance to organizations working to incarcerate women who have abortions.

The global gag rule also contravenes the precept that “[a]ny measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process.”⁶⁹ The United States is shackling the national legislative process of foreign governments by prohibiting the democratic participation of local NGOs and by depriving national legislators the expertise of the local NGOs regarding remedying unsafe abortion.

The U.S. government was among the most ardent proponents of strong reproductive rights language at these international conferences, and since has articulated its commitment to incorporate these principles into U.S. foreign policy.⁷⁰ The consensus of the

community of nations has affirmed that reproductive rights are human rights. The global gag rule directly conflicts with commitments agreed to by the U.S. government. The United States' restrictions on foreign aid for family planning and reproductive health undermine the leadership role the United States assumed at these international conferences. The grave implications of the global gag rule for the lives and health of women and children further damage the credibility of the United States in its international commitments.⁷¹

B. LIBERALIZATION OF ABORTION LAWS

With increasing international recognition of women's reproductive rights, draconian prohibitions on abortion have given way in many countries to more humane laws and regulations permitting abortion in cases of rape, incest, or endangerment of the life or health of the woman, and on broad socioeconomic grounds. In countries that are home to or representing 62% of the world's population,⁷² women are legally permitted to have an abortion in most circumstances. Since 1985, numerous countries that receive U.S. international family planning assistance have chosen to liberalize their abortion laws, including Albania, Botswana, Cambodia, Ghana, Nepal, Romania, and South Africa.⁷³

The global gag rule's restriction on lobbying and advocacy has a significant negative impact on abortion law reform movements in countries that receive USAID assistance. Movements to ease restrictive abortion laws may be curtailed by the gag rule, as medical care providers, advocates and their potential coalition partners fall silent on abortion in order to maintain funding for reproductive health services. By tying the hands of abortion-rights supporters, the gag rule bolsters ultraconservative, anti-choice movements working to restrict the more liberal abortion laws already established in some countries. In El Salvador in 1998, right-wing lawmakers succeeded in eliminating all grounds for abortion—even where pregnancy may cause a woman to die as a result—and passing a damaging constitutional amendment.⁷⁴

In the following USAID-recipient countries, abortion has recently been or may become the subject of legislative activity. In many cases, the proponents of reform are reproductive health providers from the medical community—one of the sectors most likely to be affected by the gag rule. The United States, through the global gag rule, restricts U.S.-funded providers from participating in public discussions about their governments' abortion policies. This prohibition on foreign NGOs' participation in their countries' democratic process is antithetical to U.S. efforts to promote democracy and free speech worldwide.

Ethiopia: Ethiopia is currently considering a new draft penal code that would expand the grounds for legal abortion to include rape and incest. The current code permits abortion only to protect a woman's life and health. The Ethiopian Women Lawyers Association has played an active role in this reform effort by organizing a coalition and issuing statements in favor of liberalizing the law on abortion.⁷⁵

A Violation of International Human Rights

Indonesia: The Indonesian government has acted to develop a proposal to reform Indonesia's restrictive abortion law. The Ministry of Health is inclined to permit abortion in cases of rape, incest and contraceptive failure.⁷⁶ This would considerably liberalize the current law, which permits abortion only when a woman's life is in danger.⁷⁷

Kenya: In September 1999, the Ministry of Health made a statement endorsing liberalization of the abortion law, which permits abortion only when the woman's life is in danger. The Kenya Chapter of the International Federation of Women Lawyers (FIDA-Kenya) was quick to follow up with advocacy in support of that recommendation.⁷⁸ More recently, members of the medical community have come forward to advocate for a relaxation of Kenya's restrictive law.⁷⁹

Moldova: Like other former Soviet republics, Moldova is debating a draft law to replace the liberal abortion law in force under Soviet rule. While it appears that there is strong support for the new legislation, which closely resembles the current law, there is a vocal conservative lobby urging that access to abortion be restricted.⁸⁰

Nicaragua: In 2001, the Nicaraguan Parliament considered legislation that would eliminate all therapeutic exceptions to the law on abortion, including the exception to save a woman's life (a measure similar to that adopted in El Salvador in 1998). Women's groups organized to defend the current abortion law.⁸¹

Philippines: In October 1999, a group of legislators proposed a law to make abortion legal in the Philippines under certain circumstances.⁸² While Filipino women's groups, health organizations and human rights groups support reform of the country's abortion ban,⁸³ the 1999 bill faced virulent opposition from the Catholic Church and was rejected by lawmakers.⁸⁴

Uganda: At a conference in Uganda in May 2001, medical providers debated whether the country's restrictive abortion law should be liberalized. While the majority opposed liberalization, a number of doctors spoke out in favor of it.⁸⁵

Zimbabwe: In response to the high numbers of maternal deaths attributable to unsafe abortion in Zimbabwe, women's activists and health experts have called for review of the country's restrictive abortion law. While these efforts have had little support from government officials, the Ministry of Health and Child Welfare is in the process of implementing programs to provide post-abortion care at all health centers.⁸⁶

In addition to reflecting the consensus reached in Cairo and Beijing,⁸⁷ the general trend toward liberalization reflects political pressure through the democratic process, which has allowed more civil society organizations—particularly women's groups—to gain political voice. As in the United States, women's increasing political and economic roles in civil society have been an important force in the liberalization of abortion laws. Although there has been a global trend toward the liberalization of national laws regulating abortion, in many countries abortion remains a hotly contested issue. Efforts to restrict access to abortion are active in parts of the world, and such efforts have met with success in Chile, El Salvador and Poland during the last decade. The global gag

rule can only serve to bolster the rhetoric of anti-choice groups active internationally, many of which are either U.S.-based or financed by U.S. groups.⁸⁸ The global gag rule gives the impression that providing legal abortions is inappropriate, even though abortion is a constitutionally protected right in the United States, and access to safe and legal abortion is recognized by many national governments as fundamental to preserving women's reproductive autonomy as well as their health.

C. HARM TO WOMEN'S REPRODUCTIVE HEALTH

Organizations that are well suited to provide comprehensive reproductive health care services, including abortion in countries where it is legal, will lose their funding or be frozen out of seeking U.S. aid. By reducing funding to such providers in under-served areas, the global gag rule will decrease women's ability to access pregnancy-related care, family planning, and services for HIV/AIDS and other sexually transmissible infections. Cuts in family planning funding mean higher rates of unintended pregnancy and abortion.

The global gag rule also undermines the international consensus on reproductive rights by compromising access to reproductive health-care services—including legal and safe abortion—in various countries. In 33 of the 56 countries (59%) that receive U.S. aid, abortion is legal on grounds broader than just to save the pregnant woman's life: either to preserve the woman's health, for socioeconomic reasons, in cases of fetal impairment, or without restriction as to reason.⁸⁹ Under the global gag rule, U.S.-funded NGOs that either provide abortions or refer or counsel on abortion in these countries where it is legal will no longer be able to do so. Medical care providers must surrender their ability to provide and discuss all reproductive health options with their patients or lose funding for desperately needed reproductive health programs. Since women faced with an unwanted pregnancy often decide to terminate it regardless of the availability of safe services, many will resort to unskilled providers or self-induce, resulting in severe consequences for women's lives and health.

The global gag rule is also likely to have a chilling effect on legal abortion-related activities that are technically "permitted" under the global gag rule, as occurred when the former Mexico City Policy was in effect.⁹⁰ In other words, women seeking abortions that are exceptions under the global gag rule (e.g., if they have been victims of rape or incest, or if their life is endangered by the pregnancy) may be turned away because of misinterpretation of the global gag rule. In addition, the provision of post-abortion care—which is explicitly allowed—such as treatment for illness or injury due to unsafe abortions, is being curtailed because entities fear jeopardizing their funding through any association with abortion. The equipment for providing post-abortion care is the same as that used for early abortion services, and organizations are afraid of having their funding terminated if they even have such equipment available for their health care providers. Center for Reproductive Rights attorneys have heard reports from local NGOs that in Bolivia, the Ministry of Health—which technically is not even covered by the global gag rule—has indicated that it will no longer endorse life-saving care for

A Violation of International Human Rights

women suffering complications from illegal, unsafe abortions as a direct result of the global gag rule.⁹¹ Health-care providers also may be reluctant to dispense emergency contraception—which acts to prevent pregnancy and is not an abortifacient—because of the global gag rule. The Bolivian NGOs reported that their government suspended efforts to permit distribution of emergency contraception because of the global gag rule.⁹² The result of the global gag rule will be increased numbers of unwanted pregnancies and still more desperate women turning to illegal, dangerous abortions.

VI. The Global Gag Rule Would Be Unconstitutional if Applied to U.S. NGOs Receiving USAID Funds

A. RELEVANT CASE LAW

Although it is constitutionally permissible for the U.S. government to restrict how a U.S.-based organization spends U.S. government funds, the Constitution does not permit the legislature to impinge upon that organization’s constitutional interests—including the right to free speech and association—by restricting how a grantee spends segregated funds received from other, non-U.S. government sources.⁹³ It is unconstitutional for the federal government to prohibit U.S.-based NGOs from using their own, private funds to exercise their constitutional right to free speech and to lobby in order to be eligible for federal funding.⁹⁴ Additionally, a funding policy may be found unconstitutional if it discriminates among various viewpoints.⁹⁵ While the Court held in *Rust v. Sullivan* that the government may prohibit health workers from providing abortion information or referrals within the context of a Title X project, the regulations at issue in *Rust* would likely have been impermissible abridgments of the grantees’ freedom of speech if they had barred recipients of government funds from freely providing information and counseling about abortion with wholly private funds outside the government-funded program.⁹⁶

With respect to federal funds for family planning, two lower courts have held that prohibitions on abortion counseling, referrals or services as requirements for eligibility for such funds are unconstitutional. The court in *Planned Parenthood v. Kempiners* held that a statute prohibiting health care providers from engaging in abortion counseling or referrals from receiving grants under another state program was unconstitutional.⁹⁷ Similarly, the court in *Planned Parenthood of Central and Northern Arizona v. Arizona* struck down a state statute that denied federal and state funding to family planning organizations that performed or promoted abortion, stating that the statute constituted “a penalty designed to chill the constitutional rights to provide abortions” and was therefore an unconstitutional condition.⁹⁸ Although the state could require the segregation of funds to ensure that the restrictions applied to the state funds, the court held that the state could not restrict non-governmental funds from being used for constitutionally protected activities such as abortion related services.

The global gag rule creates a clear double standard by restricting overseas grantees from spending their own, non-U.S. funds for abortion-related speech and other activities. Although the courts have stated that the constitutional protections guaranteed to domestic NGOs do not apply equally to foreign NGOs,⁹⁹ as a matter of policy, U.S. legislators should extend to overseas NGOs and multilateral organizations the same principles of freedom of speech and association that apply under the U.S. Constitution to U.S.-based NGOs.

In a 1989 case challenging USAID policies implementing the Mexico City Policy, *DKT Memorial Fund v. the Agency for International Development*,¹⁰⁰ a 2 to 1 majority of the Court of Appeals for the District of Columbia held that overseas NGOs were not protected by the First Amendment and thus could not challenge the USAID policies.¹⁰¹ However, then-D.C. Circuit Judge Ruth Bader Ginsburg, in her dissent, found it troubling that accommodation for non-U.S. funding of abortion-related activities was granted to U.S.-based NGOs under the First Amendment, but that overseas NGOs were left “no accommodation, no tolerance for what the organization would elect to do with other resources available to it.”¹⁰² Criticizing her colleagues’ characterization of the decision of overseas NGOs to accept U.S. funds for non-abortion related family planning activities as voluntary, she stated, “I would not so characterize the hard decision confronting foreign NGOs operating in communities with poverty so dire and conditions for women so low we cannot comprehend their situation.”¹⁰³ Justice Ginsburg articulated important principles that warrant rejection of the global gag rule:

If our land is one “of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations,” it is in no small measure so because our Constitution restrains all officialdom from infringing on fundamental human rights; just as our flag “carries its message ... both at home and abroad,” so does our Constitution and the values it expresses.¹⁰⁴

B. “FUNGIBILITY”

Proponents of the global gag rule have argued that it is necessary to prevent overseas NGOs and multilateral organizations from taking U.S. funds, because that would “free up” their own funds for abortion-related activities; in other words, that “all money is fungible.”¹⁰⁵ This argument has been specifically rejected in federal cases with respect to providers of abortion services in the United States.¹⁰⁶ In *Planned Parenthood of Central and Northern Arizona v. Arizona*, the Ninth Circuit Court of Appeals held that, for the purposes of preventing the use of state funds for abortion-related activities, the state could only require that Planned Parenthood monitor and adequately segregate state funds from funds used for abortion-related services.¹⁰⁷ Similarly, the global gag rule applies a double standard to foreign reproductive health organizations. President Bush, himself, has discredited the fungibility argument by insisting that faith-based organizations will be able to keep U.S. funds for social service work segregated from other funds used for religious activities. He should apply the same logic to health care organizations.

A Violation of International Human Rights

VII. Conclusion

The global gag rule blocks U.S. funds appropriated for international family planning and reproductive health programs from being made available to any foreign organization that, with its own funds, provides legal abortion services or engages in abortion-related lobbying. This restriction is inconsistent with international and U.S. legal principles that include the rights to free speech, democratic participation, and reproductive autonomy. The global gag rule also undermines U.S. foreign policy objectives that encourage the building of democracy, civil society, and women's participation as equals in society. It runs counter to the U.S. commitment to women's reproductive rights and health. It would be unconstitutional if applied directly to organizations in the United States that receive federal funding. For the reasons articulated in this paper, ***the Center for Reproductive Rights urges the U.S. Congress and the Bush administration to eliminate the global gag rule.***

Endnotes

- ¹ 22 U.S.C.A. § 2151b(b) (West 1990).
- ² 22 U.S.C.A. § 2151b(a).
- ³ 22 U.S.C.A. § 2151(c)(1).
- ⁴ 22 U.S.C.A. § 2151b(f)(1). Due to the Helms Amendment, U.S. Agency for International Development (USAID) population assistance funds may not be used “to pay for the performance of abortions as a method of family planning.” *Id.* Furthermore, although USAID and its grantees are legally permitted to provide funding for abortion in cases of rape, incest, or where the life of the woman would be endangered if the pregnancy were carried to term, U.S. government officials have asserted that USAID currently does not knowingly provide any funding for abortion services. *See, e.g.*, Statement to the Washington Foreign Press Center by Julia Taft, Assistant Secretary of State for Population, Refugees and Migration, January 21, 1999 (on file with Center for Reproductive Rights).
- ⁵ Family Planning and Population Assistance Activities, 48 C.F.R. § 752.7016(b) (1996); *see also* U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID), POLICY DETERMINATION No.56, A.I.D. POLICIES RELATIVE TO ABORTION-RELATED ACTIVITIES 2 (1974).
- ⁶ *Policy Statement of the United States of America at the United Nations International Conference on Population*, 2d Sess., Mexico City (Aug 6-13, 1984) (on file with Center for Reproductive Rights) [hereinafter *Mexico City Policy Statement*].
- ⁷ The name derives from the fact that the policy was announced at the 1984 United Nations International Conference on Population in Mexico City.
- ⁸ MEXICO CITY POLICY STATEMENT, *supra* note 6. The phrase “actively promote abortion” was defined to mean a “substantial or continuing effort to increase the availability or use of abortion as a method of family planning,” including “providing advice and information regarding the benefits and availability of abortion as a method of family planning” and “[p]roviding advice that abortion is an available option” to a woman in a clinical context if she is not pregnant or has not already decided to have an abortion and stated her intention to do so. JOHN BLANE & MATTHEW FRIEDMAN, MEXICO CITY POLICY IMPLEMENTATION STUDY, app., at A-4, A-6 (Population Technical Assistance Project Occasional Paper No. 5, 1990) [hereinafter *Mexico City Policy Implementation Study*]; but *see* Alan Guttmacher Institute v. McPherson, 616 F.Supp. 195, 206 (S.D.N.Y. 1985), *aff’d as modified*, 805 F.2d 1088 (2d Cir. 1986) (interpreting similarly worded USAID regulations as permitting “neutral, informational” articles about abortion).
- ⁹ MEXICO CITY POLICY IMPLEMENTATION STUDY, *supra* note 8, at A-4.
- ¹⁰ Memorandum on the MEXICO CITY POLICY, 29 WEEKLY COMP. PRES. DOC. 88 (Jan 22, 1993).
- ¹¹ The Fiscal Year (FY) 2000 gag rule prohibited foreign NGOs from using their own funds to “perform abortions in any foreign country, except where the life of the mother would be endangered if the pregnancy were carried to term or in cases of forcible rape or incest.” Consolidated Appropriations Act, 2000, § 1001(a)(2) (P.L. 106-113), enacting Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2000, § 599D [hereinafter *Foreign Operations Appropriations Act*], § 599D(b)(1). It also disqualified foreign NGOs if they used their own, non-U.S. money to “engage in activities or efforts to alter the laws or governmental policies of any foreign country concerning the circumstances under which abortion is permitted, regulated, or prohibited.” *Id.* at 599D(b)(2). Additionally, the FY 2000 gag rule contained a procedural mechanism that allowed for a waiver of the “gag” restrictions on a small portion (\$15 million, or about 4%) of USAID population program funding, but doing so resulted in a \$12.5 million reduction in the total amount of these funds. *Id.* at § 599D(c)(2)(a). In determining which grants to organizations would be counted toward the \$15 million cap, USAID was compelled to create a “blacklist” of organizations that refused to give up their right to be involved with legal abortion-related activities with their own, non-U.S. funds. The “blacklist” not only invaded foreign NGOs’ privacy in terms of how they spend their own money, but could possibly be obtained and used by anti-choice extremists for purposes of harassment – or worse – against women’s rights and health advocates, health care providers and their families, and women who obtain health care services at facilities on the “blacklist.” The U.S. government could effectively become an accomplice to such activities by providing a road map to extremists for their targets. This certification process also compelled USAID and NGOs to expend resources in over-

A Violation of International Human Rights

seeing this requirement, thus diverting those resources away from the provision of family planning services.

¹² Foreign Operations Appropriations Act, *supra* note 11, § 599D.

¹³ Copy of the January 22, 2001, Presidential Memorandum on file with Center for Reproductive Rights. President Bush issued a Presidential Memorandum implementing the policy on March 28, 2001. “Memorandum of March 28, 2001 – Restoration of the Mexico City Policy,” 66 F.R. 61, at 17303 (March 29, 2001) [hereinafter Bush Memorandum].

¹⁴ Bush Memorandum, *supra* note 13, p. 17308. The ban applies whether the NGOs receive the funds either directly through USAID or indirectly through U.S.-based NGOs that received USAID funds.

¹⁵ *Id.* at 17311.

¹⁶ *Id.*

¹⁷ 22 U.S.C.A. § 2151b(f)(1).

¹⁸ Alan Guttmacher Institute, “The Bush ‘Mexico City’ Global Gag Rule Policy is More Extreme,” (May 2001), on file with Center for Reproductive Rights [hereinafter AGI Fact Sheet].

¹⁹ *Id.*

²⁰ *Id.*

²¹ American Bar Association (ABA) policy #10H, unanimously adopted August 1991.

²² *Id.* at 2-3 (emphasis in original, citations omitted). The policy also stated:

In the health care context, the [ABA] has opposed governmental intrusion into sensitive and confidential areas of health care ... in recognition of the fact that the professional relationship *must* be characterized by trust and privacy. The medical practitioner, like the attorney, must be free to give the patient the best possible professional advice, and this freedom must be guarded.

The principle at stake is whether federal funding is, or should be, synonymous with federal censorship. Opportunities for government manipulation of information emanating from funded projects abound. Scholarly research, library collections, and creative arts endeavors are but a few of the programs which could be jeopardized by the tolerance for “viewpoint discrimination” implicit in the [domestic gag rule] ...

From the professional’s point of view, the regulations require physicians to violate principles of medical ethics dating from the ancient days of Hippocrates, which mandate accurate and com-

plete communication of treatment alternatives, including information about abortion, and which prohibit the abandonment of a patient, at least without an appropriate referral. In effect, the same doctor could not give the same quality of care, could not even give the same answer to the same medical question, to two patients at two different facilities. Moreover, court decisions in at least thirty-six states and the District of Columbia have held that physicians may be liable for failure to disclose alternative treatment information material to the patient’s ability to make informed medical decisions. As this briefing paper goes to press, the ABA also voted to oppose the global gag rule. ABA Resolution 118, August 7, 2001.

²³ AGI Fact Sheet, *supra* note 18.

²⁴ Center for Reproductive Rights, “The Impact of the Global Gag Rule: A Country by Country Snapshot” (February 2001) [hereinafter Country by Country Snapshot].

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Bush Memorandum, *supra* note 13, at II(e)(1) and (13)(i-iii)(A)(I-II).

³³ *Id.* at II(e)(1) and (13)(iii)(A)(III).

³⁴ *Id.* at II(e)(1) and (13)(iii)(A)(IV).

³⁵ If the same restriction were placed directly on U.S.-based NGOs, it would be an unconstitutional violation of the protection of freedom of speech under the First Amendment to the U.S. Constitution. *See, e.g.,* Rust v. Sullivan, 111 S.Ct. 1759, 1774-1775 (1991); and Federal Communications Commission v. League of Women Voters of Cal., 104 S.Ct. 3106, 3128 (1984).

³⁶ Bush Memorandum, *supra* note 13, p. 17311. Paragraph II(e)(13)(iii)(A)(IV) prohibits “[l]obbying a foreign government to legalize or make available abortion as a method of family planning or lobbying such a government to continue the legality of abortion as a method of family planning.”

³⁷ *See, e.g.,* The Universal Declaration of Human Rights, art. 19, G.A. Res. 217A (III), UN GAOR, 3rd Sess., Pt. 1, at 71, U.N. Doc. A/810 (1948) (*adopted* Dec. 10, 1948) [hereinafter Universal Declaration]; International Covenant on Civil

and Political Rights, *adopted* Dec. 16, 1966, UN GAOR, Supp. No. 16, at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171 (*entered into force* March 23, 1976) (*U.S. deposit of instrument of ratification* June 8, 1992), arts. 19, 21 [hereinafter Civil and Political Rights Covenant].

³⁸ Universal Declaration, *supra* note 37, preamble.

³⁹ *Id.*, art. 19.

⁴⁰ *Id.*, art. 21(1).

⁴¹ *Status of the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Optional Protocols to the International Covenant on Civil and Political Rights, United Nations Report of the Secretary-General, A/54/277, 4* (August 25, 1999).

⁴² Civil and Political Rights Covenant, *supra* note 37, art. 19.

⁴³ American Convention on Human Rights, 1144 U.N.T.S. 123; 9 I.L.M. 673 [hereinafter American Convention], which the United States has signed but not yet ratified. See, ABA, THE INTERNATIONAL HUMAN RIGHTS OF WOMEN: INSTRUMENTS OF CHANGE, 251 (1998) [hereinafter ABA: INSTRUMENTS OF CHANGE].

⁴⁴ American Declaration of the Rights and Duties of Man, Resolution XXX, Final Act, 9th International Conference, March 30-May 2, 1948, Bogota, OAS Off. Rec., OAS Res. 30, OEA/Serv.L./V./I. 4 rev. (1965) [hereinafter Declaration of Rights and Duties], to which the United States is subject. See ABA: INSTRUMENTS OF CHANGE, *supra* note 43, at 131.

⁴⁵ Inter-American Declaration of Principles on Freedom of Expression, Inter-American Commission on Human Rights Web site at <<http://www.cidh.oas.org/declaration.htm>> (last visited July 9, 2001) [hereinafter Declaration of Freedom of Expression], to which the United States is subject.

⁴⁶ Examples include the following: “the right to seek, receive and impart information and opinions”, Declaration of Freedom of Expression, *supra* note 45, art. 2; “the right to freedom of thought and expression”, American Convention, *supra* note 43, art. 13.1; “the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever”, Declaration of Rights and Duties, *supra* note 44, art. IV; “the right to access to information about himself or herself”, Declaration of Freedom of Expression, *supra* note 45, art. 3;

“[t]he right of expression may not be restricted by indirect methods or means”, American Convention, *supra* note 43, art. 13.3; and “[r]estrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression,” Declaration of Freedom of Expression, *supra* note 45, art. 5. The gag rule violates these provisions because health care workers are prohibited from informing clients about all legal medical options; organizations are prohibited from communicating about a public health issue to their government officials, and from conducting public education about a significant public health issue; clients of health clinics are prohibited from receiving information about all legal medical options pertaining to their health conditions; and family planning assistance is being held hostage to U.S. government censorship.

⁴⁷ Summit of the Americas Plan of Action, AmericasCanada Web site at <<http://www.americascanada.org/eventsummit/declarations/plan-e.pdf>>, art. 2, p. 7 (last visited July 9, 2001).

⁴⁸ 22 U.S.C.A. § 2151(a) (West 1990). Several foreign assistance programs include the building of democratic institutions and the promotion of individual freedoms, including the freedom of speech. See, e.g., 22 U.S.C.A. § 2871 (1) (Radio Free Europe and Radio Liberty); 22 U.S.C.A. § 5401 (Support for Eastern European Democracy); 22 U.S.C.A. § 2274 (Central America Democracy, Peace and Development Initiative).

⁴⁹ 22 U.S.C.A. § 2151(b)(8).

⁵⁰ 22 U.S.C.A. § 2151(u)(a).

⁵¹ USAID, USAID’s *Strategy for Sustainable Development* (visited August 18, 1997) <<http://www.info.usaid.gov/democracy/strategy.htm>> (since revised). “USAID will support programs in four areas that are fundamental to sustainable development: Population and Health, Broad-Based Economic Growth, Environment, and Democracy.” *Id.* “Democracy’s freedoms permit the formation of a wide range of non-governmental organizations throughout society, including community associations, service providers, unions, advocacy groups, and religious institutions. These private organizations often stimulate innovation in production and social services, confront corruption, advocate respect for human rights, and promote and defend democra-

A Violation of International Human Rights

tic process and institutions.” *Id.*

⁵² 22 U.S.C.A. §§ 2151-1(6), 2151b(d)(1), 2151k, 2225.

⁵³ USAID, Fact Sheet: USAID Office of Women in Development.

⁵⁴ *Id.*; see also USAID, Fact Sheet: New USAID Women’s Legal Rights Initiative; see also USAID, Reproductive Health Programs Supported By USAID: A Progress Report on Implementing the Cairo Program of Action 14 (1996).

⁵⁵ “Council of Europe Parliament on the Global Gag Rule,” Strasbourg, March 4, 2001, e-mail press release about the Council of Europe’s Parliamentary Assembly Committee on Equal Opportunities for Women and Men, which adopted a declaration in opposition to the global gag rule (press release on file with Center for Reproductive Rights). The press release referenced a similar declaration adopted by the Inter-European Parliamentary Forum on Population and Development in March 2001.

⁵⁶ For example, in the context of the imposition of the Mexico City Policy in 1984, the United States stated that if nations “support abortion with funds not provided by the U.S. government,” they nonetheless qualify as grantees and the United States “will contribute to such nations [for family planning programs] through segregated accounts which cannot be used for abortion.” Mexico City Policy Statement, *supra* note 6. Similarly, the new global gag rule does not apply to foreign governments. Foreign Operations Appropriations Act, *supra* note 11, at § 599D. Therefore, both policies create a double standard between overseas NGOs and foreign governments.

⁵⁷ See, e.g., Programme of Action of the International Conference on Population and Development, Cairo, Egypt, 5-13 Sept. 1994, Principle 8 and 7.3, in Report of The International Conference on Population And Development, UN Doc. A/CONF. 171/13/Rev.1 (1995), at Chapter II, Principles, first paragraph [hereinafter Cairo Programme].

⁵⁸ For example, a Bolivian NGO that receives U.S. funding wrote a letter to USAID’s representative in Bolivia expressing strong dismay over having to certify that it would comply with the FY 2000 global gag rule restrictions (letter dated March 13, 2000, on file with Center for Reproductive Rights).

⁵⁹ International instruments recognizing reproductive rights include: the Universal Declaration, *supra* note 37, arts. 28, 55, 56; the Civil and Political Rights Covenant, *supra* note 37, art. 23(2); the International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, 993

U.N.T.S. 3, art. 12 (*entry into force* Jan. 3, 1976) [hereinafter Economic and Social Rights Covenant]; the Convention on the Elimination of All Forms of Discrimination Against Women, *adopted* March 1, 1980, 1248 U.N.T.S. 13, arts. 10, 12, 16.1 (*entry into force* Sept. 3, 1981) [hereinafter Women’s Convention]; and the Convention on the Rights of the Child, *adopted* Nov. 20, 1989, art. 24(3), G.A. Res. 44/25, 44 U.N.GAOR Supp. (No. 49), U.N. Doc. A/Res/44/49, 30 I.L.M. 1448 (1989) (*entry into force* Sept. 2, 1990) [hereinafter Children’s Convention]. The United States is a signatory to all of these international instruments, and the Civil and Political Rights Covenant was ratified by the United States in 1992. See, Civil and Political Rights Covenant, *supra* note 37. See generally UNFPA, The State Of World Population 1997: The Right To Choose: Reproductive Rights And Reproductive Health (1997).

⁶⁰ Women’s Convention, *supra* note 59, arts. 10, 12, 16.1; see also *Committee on the Elimination of Discrimination Against Women Meets at Headquarters*, 17 January-4 February, Press Release, UN Doc. WOM/1153 (January 17, 2000).

⁶¹ During the International Conference on Population and Development (ICPD), most of the 179 governments in attendance, including the United States, adopted by consensus the Cairo Programme of Action, which acknowledged reproductive rights as integral to human rights. Cairo Programme, *supra* note 57. The Cairo Programme affirmed “the right to have access to safe, effective, affordable and acceptable methods of family planning” and “the right of access to appropriate health-care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.” *Id.* at para. 7.2. It also affirmed the principles that “[r]eproductive rights... rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health;” *id.* at para. 7.3; and that “Governments should make it easier for couples and individuals to take responsibility for their own reproductive health by removing unnecessary legal, medical, clinical and regulatory barriers to information and access to family-planning services and methods.” *Id.* at para. 7.20.

⁶² *The Beijing Declaration and Platform for Action, Fourth World Conference on Women, Beijing, China, 4-15 September, 1995*, 94, UN Doc. DPI/1766/Wom (1996) [hereinafter Beijing Platform]. The 189 gov-

ernments, including the United States, attending the Beijing Conference generally endorsed and extended the Cairo Programme's principles regarding reproductive health and reproductive rights in the Beijing Platform. This document affirmed that "[t]he explicit recognition and reaffirmation of the right of all women to control all aspects of their health, in particular their own fertility, is basic to their empowerment," *id.* at para 17; and that "[i]n most countries, the neglect of women's reproductive rights severely limits their opportunities in public and private life, including opportunities for education and economic and political empowerment. The ability of women to control their own fertility forms an important basis for the enjoyment of other rights." *Id.* at para. 97.

63 In 1999 the United Nations General Assembly undertook a five-year review and affirmation of the reproductive rights principles articulated in the 1994 Cairo Conference (also known as Cairo+5), and adopted a consensus document. Key Actions for the further implementation of the Programme of Action of the International Conference on Population and Development, Report of the Ad Hoc Committee, 21st Sess., UN Doc a/S-21/5/Add.1 (1 July 1999) [hereinafter ICPD+5 Key Actions Document]. This document reiterates the provisions on unsafe abortion from the Cairo Programme and Beijing Platform, and emphasizes that additional strategies to reduce the health impact of unsafe abortion must be undertaken. *Id.*, at 63(i) and (ii). See also CENTER FOR REPRODUCTIVE RIGHTS, ICPD+5: GAINS FOR WOMEN DESPITE OPPOSITION (October 1999). In June 2000, delegates from more than 180 countries gathered in New York for a Special Session of the UN General Assembly to review implementation of the 1995 Beijing Platform for Action (also known as "Beijing+5"), and culminated in a detailed analysis of what has occurred since 1995 and how to move implementation forward. Further actions and initiatives to implement the Beijing Declaration and the Platform for Action (Annex, Draft Resolution II), Report of the Ad Hoc Committee of the Whole of the twenty-third special session of the General Assembly, New York, 5-9 June 2000, UN Doc A/S-23/10/Rev.1 (visited May 24, 2001) <<http://www.un.org/womenwatch/daw/followup/beijing+5.htm>> [Beijing+5 hereinafter Review Document]. The Review Document focuses on a number of fundamental reproductive rights issues, in some cases echoing or building on agreements reached during Cairo+5, and directs governments to "[r]eview and

revise national policies, programmes and legislation to implement" the document agreed upon at Cairo+5, particularly "the specific benchmarks" related to maternal mortality, provision of the widest achievable range of safe and effective contraception, and reduction of young people's risk of HIV/AIDS. *Id.* at 79 (c). The Review Document echoes the Cairo+5 language concerning several areas of reproductive rights, and directs governments to "[e]nsure that the reduction of maternal morbidity and mortality is a health sector priority and that women have ready access to essential obstetric care, well-equipped and adequately staffed maternal health-care services, skilled attendance at delivery, [and] effective referral and transport to higher levels of care." *Id.* para. 72 (b).

64 Cairo Programme, *supra* note 57, para. 8.25, and Beijing Platform, *supra* note 62, para. 106(k). The Beijing Platform also calls for states to "consider reviewing laws containing punitive measures against women who have undergone illegal abortions." Beijing Platform, *supra* note 62, at 106(k).

65 Cairo Programme, *supra* note 57, para. 8.25, and Beijing Platform, *supra* note 62, para. 106(k).

66 *Id.*

67 ICPD+5 Key Actions Document, *supra* note 63, para. 63(iii)

68 Beijing+5 Review Document, *supra* note 63, para. 107(i). See also Beijing Platform, *supra* note 62, para. 106(k).

69 *Id.*

70 PRESIDENT'S INTER-AGENCY COUNCIL ON WOMEN, AMERICA'S COMMITMENT: FEDERAL PROGRAMS AND NEW INITIATIVES AS FOLLOW-UP TO THE U.N. FOURTH WORLD CONFERENCE ON WOMEN, at i (1997).

71 CENTER FOR REPRODUCTIVE RIGHTS, INTERNATIONAL FAMILY PLANNING AND REPRODUCTIVE HEALTH PROGRAMS: WHEN WILL THE U.S. GOVERNMENT FULFILL ITS COMMITMENTS? (JULY 2001)

72 CENTER FOR REPRODUCTIVE RIGHTS, THE WORLD'S ABORTION LAWS 2003 (poster, see text).

73 Anika Rahman, Laura Katzive and Stanley K. Henshaw, *A Global Review of Laws on Induced Abortion, 1985-1997*, INTERNATIONAL FAMILY PLANNING PERSPECTIVES, Vol. 24, No. 2, at 60 (June 1998).

74 See CENTER FOR REPRODUCTIVE RIGHTS, PERSEGUIDAS – PROCESO POLITICO Y LEGISLACION SOBRE ABORTO EN EL SALVADOR: UN ANALISIS DE DERECHOS HUMANOS (2000).

75 See Seble Bekele, *Ethiopia; Legalize Abortion in*

A Violation of International Human Rights

- Ethiopia?*, DAILY MONITOR, Oct. 30, 2000, available at <<http://allafrica.com/stories/200010300334.html>> (last visited Apr. 12, 2001).
- ⁷⁶ See Richel Dursin, *Population-Indonesia: Government Seeks To Ease Abortion Ban*, Inter Press Service, Sept. 7, 2000, available at <<http://www.ips.org/index.htm>> (last visited Apr. 12, 2001).
- ⁷⁷ Health Law Number 23 of 1992 provides that “in case of emergency, and with the purpose of saving the life of a pregnant woman or her fetus, it is permissible to carry out certain medical procedures” (unofficial translation). See Terence H. Hull et al., *Induced Abortion in Indonesia*, 24 STUDIES IN FAMILY PLANNING 241, 244-45 (1993).
- ⁷⁸ See *Legalize Abortion*, NATION, Sept. 5, 1999, available at <<http://allafrica.com/stories/199909050049.html>> (last visited Apr. 12, 2001).
- ⁷⁹ See Dr. J. Osur, *Abortion Illegal Only For Poor*, NATION, Aug. 3, 2000, available at <<http://allafrica.com/stories/200008030410.html>> (last visited Apr. 12, 2001).
- ⁸⁰ See *Orthodox Church Threatens Lawmakers With Excommunication If They Legalize Abortion*, AP WORLDSTREAM, Nov. 17, 2000, LEXIS-NEXIS, News Library, AP Worldstream File (on file with Center for Reproductive Rights).
- ⁸¹ See Ralf Leonhard, *Nicaragua Government Seeks To Ban All Abortions*, WOMENSENEWS (July 28, 2000), at <<http://www.womensenews.com/article.cfm?aid=214&mode=today>> (last visited Apr. 12, 2001).
- ⁸² See *Philippine Lawmakers Defy Church on “Anti-Family” Legislation*, DEUTSCHE PRESSE-AGENTUR, Oct. 6, 1999, LEXIS-NEXIS, News Library, Deutsche Presse-Argentur file (on file with Center for Reproductive Rights).
- ⁸³ See Likhaan, *International Dialogue on Safe Abortion* (Conference Report) 58 (2000).
- ⁸⁴ Deutsche Presse-Agentur, *supra* note 71.
- ⁸⁵ See *Doctors Divided Over Legalizing Abortion*, NEW VISION, May 29, 2000, available at <<http://allafrica.com/stories/200005290064.html>> (last visited Apr. 12, 2001).
- ⁸⁶ See Paul Nyakazeya, *Women Call for Abortion Review*, ZIMBABWE STANDARD, Jan. 9, 2000, available at <<http://allafrica.com/stories/200001090050.html>> (last visited Apr. 12, 2001).
- ⁸⁷ See Beijing Platform, *supra* note 62, paras. 95, 106(k); Cairo Programme, *supra* note 57, paras. 7.3, 7.6, 8.25.
- ⁸⁸ See, e.g., Gillian Kane, *Exporting Anti-Choice*, MS. MAGAZINE, Vol. X, No. 3 (April/May 2000) at 28.
- ⁸⁹ The 33 countries are Albania, Armenia, Azerbaijan, Bolivia, Botswana, Burkina Faso, Cambodia, Cameroon, Ecuador, Eritrea, Ethiopia, Georgia, Ghana, Guinea, India, Jamaica, Jordan, Kazakhstan, Kyrgyz Republic, Liberia, Moldova, Morocco, Mozambique, Peru, Romania, Russia, Rwanda, South Africa, Tajikistan, Turkey, Turkmenistan, Ukraine, Uzbekistan, Zambia and Zimbabwe. See Center for Reproductive Rights, “The Global Gag Rule’s Effects on Gagged Countries” (April 2001). In 24 of the 59 countries (41%) that receive U.S. family planning funds, abortion is not generally legally available; in at least 15 of the others, abortion remains severely restricted, even though technically legal in some circumstances. The 24 countries are Bangladesh,* Benin, Cote d’Ivoire,* Dominican Republic, Egypt, El Salvador, Guatemala,* Haiti, Honduras, Indonesia,* Kenya,* Madagascar, Malawi,* Mali, Nepal, Nicaragua,* Nigeria,* Paraguay, Philippines, Senegal, Tanzania,* Togo, Uganda,* Yemen.* In the countries denoted with an “*”, the law explicitly permits abortion in cases of a threat to the pregnant woman’s life. Other countries on this list may not penalize abortions performed in cases of “necessity,” such as when a woman’s life is in danger. The global gag rule does not prohibit the provision of abortion services in cases of threat to the woman’s life, rape or incest.
- ⁹⁰ Mexico City Policy Implementation Study, *supra* note 8, at vi.
- ⁹¹ Center for Reproductive Rights, “The Global Gag Rule: U.S. Government Policy Hinders
- ⁹² *Id.*
- ⁹³ See *Rust v. Sullivan*, *supra* note 35. See also, *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (the government “may not deny a benefit to a person on the basis that infringes his constitutionally protected interests – especially, his interest of freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited”). As the government may “burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression,” *Velazquez v. Legal Services Corp.*, 164 F.3d 757 (2d Cir. 1999), the court in *Rust* provided that allowing the recipient to spend its own, non-federal funds without the burden of the restrictions met this standard.

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