



# US Abortion Restrictions on Foreign Aid and Their Impact on Free Speech and Free Association:

## THE HELMS AMENDMENT, SILJANDER AMENDMENT AND THE GLOBAL GAG RULE VIOLATE INTERNATIONAL LAW

### I. INTRODUCTION

The United States (US) imposes restrictions on its foreign aid that limit both services and speech related to abortion. They attach to nearly all recipients of foreign aid—limiting the activities, speech, and information that can be legally provided by doctors, health professionals, experts and advocates. These restrictions violate the US’s fundamental human rights obligations to protect free speech and free association.

This brief first explains the restrictions on free speech and association imposed by the US Congress (the Helms and Siljander Amendments) and by the executive branch (the Global Gag Rule [“Gag Rule” or “GGR”]). It then details the US’s human rights obligations to respect freedom of speech and association, focusing on obligations under the International Covenant on Civil and Political Rights (ICCPR). The ICCPR only allows for the restriction of these rights in narrow circumstances: where the restriction is adequately provided by law, where it serves a legitimate aim (such as national security or public health), and where the state demonstrates that the restriction is necessary and proportionate in achieving that aim. This brief demonstrates that the Helms and Siljander Amendments and the GGR all fail that strict test, and therefore violate US obligations to ensure and protect the rights to free speech and association guaranteed under international human rights law.

### II. THE UNITED STATES RESTRICTS FREE SPEECH AND FREE ASSOCIATION THROUGH CONGRESSIONAL AND EXECUTIVE MEASURES

The Helms Amendment (“Helms”), first enacted in 1973, provides that no US funds “may be used to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.”<sup>1</sup> The Leahy Amendment was enacted in 1994 in an attempt to clarify that the term “motivate” in the Helms Amendment “shall not be construed to prohibit the provision, consistent with local law, of information or counseling about all pregnancy options,” but it has had little effect in limiting the Helms Amendment’s prohibitions.<sup>2</sup> Instead the term “motivate” has been interpreted broadly by the US government and has been used to censor neutral abortion speech and to prevent support for abortion in circumstances far beyond family planning. While the restrictions initially applied only to development assistance under Part I of the Foreign Assistance Act (development assistance), they now apply to all foreign assistance.<sup>3</sup> Today these restrictions are applied as a total ban on abortion speech and services, with no exceptions for rape, incest or life endangerment, and even on humanitarian aid for girls and women raped in war.<sup>4</sup> The Helms Amendment permits organizations to use non-US funds for abortion-related activities, though they are required to maintain segregated accounts for use in those activities.<sup>5</sup>

The Siljander Amendment (“Siljander”), introduced into appropriations bills in 1981, imposes restrictions on the use of abortion funds for lobbying activities. The Amendment’s restrictions originally only prohibited lobbying for abortion, but have since been amended to prohibit US funds from being “used to lobby *for or against* abortion.”<sup>6</sup> Siljander, like Helms, is habitually included in annual appropriations measures and applies to all foreign assistance.

The Global Gag Rule (also called the “Mexico City Policy” and now termed “Protecting Life in Global Health Assistance”) is an executive action, first taken by President Reagan in 1984, that imposes additional abortion

restrictions on non-US NGOs (“foreign NGOs” or “fNGOs”) receiving either direct support or sub-grants from certain US foreign assistance funding streams. The GGR prohibits global health assistance from being provided to fNGOs that use funding *from any source* to perform abortions as a method of family planning (with limited exceptions in cases of rape, incest or life endangerment)<sup>7</sup> or to “actively promote abortion as a method of family planning,” which includes counseling or referring women for abortion<sup>8</sup> or lobbying for abortion, including lobbying to make abortion legal in their own country. Unlike the Helms and Siljander Amendments, the GGR is imposed at the discretion of the US president<sup>9</sup> and only applies to fNGOs receiving “global health” assistance, rather than all foreign assistance. The GGR does not apply directly to US NGOs, but it requires US NGOs who receive US global health assistance to include its limitations in their grants and agreements with foreign NGOs. Since 1984, the GGR has been implemented (by Republican presidents) and rescinded (by Democratic presidents) along political party lines. While under previous Republican presidents the GGR only applied to fNGOs receiving US family planning assistance, President Trump extended the GGR to apply to nearly all global health assistance funds when he reinstated it in 2017.<sup>10</sup> For more information on these restrictions and the distinctions between them, see the Global Justice Center’s *FAQ: How US Abortion Restrictions on Foreign Assistance, Including the Global Gag Rule, Violate Women’s Rights and Human Rights*.<sup>11</sup>

### **III. THE UNITED STATES IS OBLIGATED BY INTERNATIONAL HUMAN RIGHTS LAW TO PROTECT FREEDOM OF SPEECH AND FREE ASSOCIATION**

The fundamental human rights to freedom of speech and free association are protected by several treaties, declarations, and other instruments.<sup>12</sup> This brief focuses on the treatment of these rights under the International Covenant on Civil and Political Rights (ICCPR) because it both binds the US (ratified in 1992<sup>13</sup>) and is widely applicable.<sup>14</sup>

The ICCPR guarantees the right to freedom of speech (Article 19) and to freedom of association with others (Article 22),<sup>15</sup> which includes access to funding in order to carry out association activities.<sup>16</sup> These rights are secured by obligations—ICCPR Article 2 requires that States parties adopt laws or other measures necessary to effectuate the rights to speech and association (and all other rights protected by the Covenant).<sup>17</sup> These obligations are owed not only to individuals and NGOs, but also to other States parties.<sup>18</sup>

Importantly, rights protected under the ICCPR cannot be abridged unless very specific conditions are present. The ICCPR lays out a strict three-part test for when a state’s restrictions on these guaranteed human rights are permissible. Under the test, all restrictions on speech and association must: (1) be provided by law; (2) serve a legitimate aim; and (3) be necessary and proportional to achieving that aim.<sup>19</sup>

US abortion speech and association restrictions (Helms, Siljander, and GGR) fail to meet each prong of this three-part test, violating both the freedom of speech and the freedom of association guaranteed by the ICCPR. In summary, these restrictions are not prescribed with enough clarity for providers and human rights advocates to know what conduct is allowed, they do not serve one of the legitimate aims described by the ICCPR, and they are neither necessary nor proportionate to achieving a legitimate aim. In violating rights to free speech and association, they also limit the realization of other human rights that individuals and NGOs fight to protect and make effective, including the rights to life, privacy, health, freedom from torture, cruel and degrading treatment, equal protection and non-discrimination.<sup>20</sup>

### **IV. UNITED STATES RESTRICTIONS ON ABORTION-RELATED SPEECH VIOLATE THE RIGHT TO FREEDOM OF SPEECH UNDER THE ICCPR**

Under Article 19 of the ICCPR, everyone has the right to freedom of speech and to hold opinions without interference. This includes the “freedom to seek, receive, and impart information and ideas of all kinds” through any manner (such as speech, writing, art) or medium.<sup>21</sup> Article 19 notes that restrictions on speech are permissible only in limited circumstances: namely where they: (1) are provided by law; (2) serve a legitimate aim; and (3) are necessary and proportionate to achieve that aim.<sup>22</sup>

### ***a. US Restrictions are not “Provided by Law” Because They do not Allow Impacted Persons and Organizations to Regulate Their Conduct and Because the US Government has Unfettered Discretion in Enforcement***

For a restriction to be adequately “provided by law,” the Human Rights Committee has explained that it must: (i) be accessible to the public; (ii) be formulated with precise language that allows individuals to regulate their conduct; and (iii) not allow “unfettered discretion” to those charged with its execution.<sup>23</sup>

US abortion speech restrictions fail requirements (ii) and (iii) because they are rendered in imprecise language that precludes individuals or NGOs from regulating their conduct and because the restrictions allow US government agencies unfettered discretion in deeming activities or speech to be compliant or noncompliant.

First, the precise language requirement means that individuals must know which of their conduct is allowed and which is prohibited.<sup>24</sup> US abortion speech restrictions do no such thing. The restrictions placed on speech to “motivate,” “lobby for or against,” or “actively promote” abortion are vague and do not provide NGO grantees and individuals with sufficient precision or clarity on what speech is allowed. The precise meaning of “motivate” in the Helms Amendment remains unclear, despite the Leahy Amendment’s attempt to clarify that counseling on pregnancy options should not be considered “motivation.”<sup>25</sup> The US Agency for International Development (USAID), for example, has in the past attempted to censor publications that report neutral statistics on maternal mortality, unsafe abortions and legalization in other countries – speech that falls outside the scope of the Helms Amendment.<sup>26</sup> There has also been confusion as to what constitutes “lobbying” under the Siljander Amendment.<sup>27</sup> The chilling effect that these restrictions have on speech is clear: studies have found that health providers and grantees are confused about prohibited activities and mistakenly believe the restrictions constitute a complete ban on all abortion activities and discussion, which includes omitting abortion as an option for women pregnant as a result of rape (which is not abortion “as a method of family planning”).<sup>28</sup> The language of US abortion speech restrictions is therefore not formulated with sufficient precision that allows individuals and NGOs to regulate their conduct and activities accordingly (or put another way, to reasonably foresee the consequences of their conduct).

Second, the unfettered discretion requirement reflects the reality that laws whose limits are vague and undefined invite arbitrary or expansive enforcement by officials beyond their original intention. In particular, laws that seem arbitrarily applied by officials do not have ascertainable or predictable consequences for those subject to them.<sup>29</sup> For this reason, the “law itself” must “establish the conditions under which the rights may be limited.”<sup>30</sup>

Again, US abortion speech restrictions fail this test. US government agencies tasked with implementation and enforcement of abortion speech restrictions have declined to put clear (and requested) guidance on the restrictions in writing,<sup>31</sup> and have preferred to advise on compliance on a “case-by-case basis,”<sup>32</sup> which constitutes unfettered discretion.<sup>33</sup> Where agencies do provide guidance, the information provided is ambiguous at best. USAID’s 2014 “guidance” for implementing the Siljander Amendment, for example, simply reminds grantees that “determinations of compliance with legal restrictions are fact-specific” and that “at the outset of an activity, it is not always possible to identify whether a Siljander question may come up in [their] program.”<sup>34</sup> It asks staff and partners to check with USAID to address questions, effectively creating a “check” on all organization activities by a funder.<sup>35</sup> Furthermore, USAID’s standard contract provisions explain the Gag Rule’s requirement to not “actively promote abortion” by including a representative sample list of prohibited activities but noting that prohibited activities are “not limited to” those described,<sup>36</sup> ultimately reserving discretion to deem additional activities non-compliant.

Publications from government agencies such as the State Department and USAID have done little to mitigate confusion among grantees on what speech is allowed. Instead, the aggressive over-implementation and overly broad interpretations of US abortion speech restrictions has contributed to a “chilling effect” on speech regarding the availability of abortion and the need for safe abortion services, even where legal under national and international law.<sup>37</sup> The lack of consistent interpretation and sufficient guidance demonstrates the US government’s “unfettered discretion” in interpreting the restrictions, creating a “risk of arbitrary and discriminatory enforcement.”<sup>38</sup>

Thus, because US abortion restrictions on speech are imprecise and are enforced with arbitrary discretion, they do

not meet the requirement of “provided by law” as required by the ICCPR and thereby violate Article 19 obligations to protect the freedom of speech.

### ***b. US Restrictions do not Serve a “Legitimate Aim” and Instead Decrease Access to Healthcare and Impede Political Debate on the Realization of Human Rights Guarantees***

The second prong of the test for permissible restrictions on speech requires that any limitation on speech serve a legitimate aim.<sup>39</sup> Article 19 explicitly establishes that the only aims that can justify restricting speech are respect of the rights or reputations of others or the protection of national security, public order, public health or morals.<sup>40</sup> The onus is on the State party to demonstrate that one of these aims is duly met.<sup>41</sup>

The US has not provided a “legitimate aim” to justify its restrictions on abortion-related speech. Instead, the imposition of the restrictions is both reactionary and unrelated to the ICCPR’s stated legitimate aims. The Helms Amendment, for example, was enacted to limit the use of US resources for abortion in the wake of the US Supreme Court’s recognition in *Roe v. Wade* that abortion was a fundamentally protected constitutional right.<sup>42</sup> Similarly “illegitimate,” President Reagan first described the Global Gag Rule in Mexico City in 1984 in the context of economic development and population policies, proclaiming in contrast to human rights recognitions and public health findings that “the US does not consider abortion an acceptable element of family planning programs.”<sup>43</sup> These objectives do not fit within the limited aims described by Article 19 for permissibly regulating the freedom of speech.

In fact, US abortion speech restrictions do the *exact opposite* of the legitimate aims of respecting the rights of others and protecting public health.<sup>44</sup> Limiting access to abortion, whether through restrictive laws or curbing available services, does not affect abortion rates, but does adversely affect the number of unsafe abortions and the rate of maternal mortality.<sup>45</sup> The World Health Organization has found that 97% of the estimated 25 million unsafe abortions that occur each year are in developing countries, and that between 4.7–13.2% of maternal deaths are attributable to unsafe abortion.<sup>46</sup> By limiting the provision of safe abortion-related services and counseling,<sup>47</sup> US restrictions have been shown to decrease women’s access to necessary healthcare and medical treatment.<sup>48</sup> Thus, despite the GGR’s new formal name—“Protecting Life in Global Health Assistance”—it is still the same deadly policy.

Beyond the explicit aims contained in Article 19, the Human Rights Committee has further noted that restrictions are impermissible where they “impede political debate,” or withhold “information of legitimate public interest that does not harm national security[.]”<sup>49</sup>

US abortion speech restrictions do both. The restrictions are included as standard clauses in contracts between USAID and foreign governments, requiring those foreign governments to apply abortion speech restrictions to all “democracy and governance activities that will support constitutional or any health-related legislative reform.”<sup>50</sup> In its guidance for implementing the Siljander Amendment, USAID reminded staff that “the subject of abortion can come up in non-health contexts, such as constitutional or other legislative reform.”<sup>51</sup> The Global Gag Rule prohibits “[l]obbying a foreign government to legalize or make available” or “continue the legality of abortion as a method of family planning,” and prohibits organizations from “[c]onducting a public information campaign in foreign countries regarding the benefits and/or availability of abortion as a method of family planning.”<sup>52</sup> These prohibitions impede access to information and political debate that might otherwise allow countries to comply with recommendations made by international human rights bodies to decriminalize and improve access to abortion services and advance public health outcomes in their own countries.<sup>53</sup> By limiting the dissemination of research regarding unsafe abortions and maternal mortality<sup>54</sup> and limiting advocacy for legislative or policy changes that would allow other states to bring their domestic legal framework in line with human rights provisions, the US abortion speech restrictions impede political debate and withhold information of legitimate public interest in violation of the ICCPR.

Since US abortion speech restrictions do not fall within the express aims contained in Article 19, and owing to the fact that the restrictions in fact harm public health, impede public debate, and withhold information in the public’s interest, they fail to serve a legitimate aim sufficient to justify a restriction of the freedom of speech under the ICCPR.

### **c. US Restrictions are not “Necessary” nor “Proportionate” to Achieving a Legitimate Aim Under the ICCPR**

Under the test’s third prong for permissible abrogations of speech, any restrictions on the right to free speech must be “necessary and proportionate” to achieve a legitimate aim. That is, in addition to proving that a limitation on speech is pursuant to a “legitimate aim” (prong 2), it must also prove to be necessary and proportional.<sup>55</sup> Other ICCPR rights subject to the same three-part test as well as the European Convention use the phrase “necessary in a democratic society,” which highlights the centrality and importance of the freedom of speech to achieve and protect other human rights.<sup>56</sup>

Human rights bodies and courts have used several different assessments in order to determine whether a restriction is “necessary.” First, the Human Rights Committee has stated that a restriction “violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”<sup>57</sup> Even if a legitimate aim is established, therefore, a state restricting speech must prove that there are no less intrusive means by which to achieve that aim.<sup>58</sup> Second, regional courts have considered whether restrictions were “appropriate” or “relevant and sufficient,” criteria that examine the connection between the end (protection of a legitimate aim) and the means (the restriction).<sup>59</sup> The Human Rights Committee has similarly stated that restrictions must be “appropriate to achieve their protective function” or “directly related to the specific need on which they are predicated.”<sup>60</sup> Third, the necessity inquiry includes ensuring that restrictions comply with the principle of proportionality. Proportionality protects against overbroad restrictions on speech and takes into account the form of expression, as the ICCPR places especially high value on speech surrounding debates about public and political issues and figures and speech made in defense of human rights.<sup>61</sup> Proportionality compares the harm inflicted by restricting speech against the identified interest protected.<sup>62</sup> In summary, restrictions are not “necessary” if there are less intrusive ways to achieve that aim, if the means imposed (the restrictions themselves) are not directly connected to achieving a legitimate aim, or if the harm caused by the restriction is disproportionate to the interest protected.

The abortion speech restrictions imposed by Helms, Siljander, and GGR are not “necessary” under the ICCPR’s standards because they are not the least intrusive ways to achieve a legitimate aim, they are not directly connected to achieving such an aim, and the harm they cause to women’s health and the democratic process is disproportionate to any purported US government interest protected by the restrictions. As noted above, the US has not articulated a legitimate aim under the ICCPR as justification for restricting abortion speech, so it is difficult to examine whether the restrictions are directly connected to that legitimate aim and whether they are the least intrusive way to achieve it. To better explain the necessity test, however, this section assumes a legitimate aim has been asserted.

First, US restrictions on abortion-related speech are not the least intrusive means through which to achieve a legitimate aim. While the Global Gag Rule, for example, began as an expression of President Reagan’s family planning policy and therefore applied only to family planning assistance, the Trump administration has expanded the restrictions to apply to all global health assistance, which includes aid in health programs unrelated to family planning, such as those that target HIV/ AIDS, child health, malaria, and global health security, among others.<sup>63</sup> In addition, the Helms and Siljander Amendments apply to all foreign assistance and have, for example, been used to censor speech around constitutional reform.<sup>64</sup> Preventing speech on “abortion as a method of family planning” in places where the US is not involved in family planning assistance exemplifies the overbroad application of US abortion speech restrictions beyond their stated family planning objectives and is contrary to international human rights law.<sup>65</sup>

Second, the US abortion speech restrictions are not directly connected to achieving a legitimate aim. As described above, they are not effective at reducing the rate of abortion or improving the health of women—on the contrary, abortion rates have remained largely unchanged in the developing world in the past decade, and women’s access to necessary healthcare decreases when the Global Gag Rule is re-imposed.<sup>66</sup> Specifically in noting the ineffectiveness of similar injunctions in reducing abortion rates, the European Court of Human Rights has held that prohibiting information about safe abortion violated free speech under the European Convention.<sup>67</sup> Further, rather than being “necessary,” the political nature of the Global Gag Rule (rescinded by US presidents along party lines



by executive order)<sup>68</sup> illustrates that even the US government does not consistently consider speech restrictions to be related to any goal.

Third, the restriction on abortion-related speech imposed by Helms, Siljander, and the Global Gag Rule creates a harm that is far disproportionate to any interest it protects. The freedom of speech is recognized as a cornerstone of democratic societies, and the debate and accountability it fosters is essential to achieving other ICCPR rights.<sup>69</sup> Beyond simply preventing counseling by medical professionals about abortion as an option, US restrictions also prevent debate about neutral statistics on the rate of unsafe abortion and maternal mortality, as well as debate about amending domestic law to comply with international human rights obligations related to abortion. In doing so, US abortion speech restrictions harm the domestic democratic processes of other countries by preventing the free and open discussion of abortion as a right and preventing the discussion of legislative changes that might make that right effective. Hypocritically, the US domestically recognizes the right to abortion as a fundamental right, but prevents its recognition as such abroad through these restrictions.<sup>70</sup> These are clear violations of the prohibition on using speech restrictions to limit debate on issues of public interest and the advocacy of human rights.<sup>71</sup> The impact inflicted by US abortion speech restrictions is severe—they threaten women’s health and limit freedoms that are fundamental to democratic societies. This impact is disproportionate to any US government interest sought to be protected.

A specific example of the harmful impact of US abortion restrictions can be seen in Kenya’s attempt to address its public health crisis resulting from high rates of unsafe abortion. Kenya has a disproportionately high fatality rate compared to neighboring countries due to unsafe abortions, with up to 35% of maternal deaths attributable to unsafe abortions, and abortion rates remaining unchanged within the last decade.<sup>72</sup> To address this issue, the 2010 Kenyan Constitution made abortion legal where “in the opinion of a trained health professional, there is need for emergency treatment, or the life or health of the mother is in danger, or if permitted by any other written law.”<sup>73</sup> The Kenyan Ministry of Health issued guidelines in 2012 in order to help healthcare providers implement this constitutional right and to increase access to quality abortion care where legal under the Constitution. In a 2013 study, the Ministry deemed it “critical” and “urgent” to implement these guidelines and to increase access to and information regarding contraceptives and safe abortion in order to reduce incidences of unsafe abortion.<sup>74</sup> In 2013, USAID’s Kenya mission emailed Kenyan grantees advising them not to attend a meeting convened by the Ministry of Health because the meeting’s purpose—“to discuss a strategy to reduce maternal mortality in Kenya”—would likely include a reproductive health discussion and therefore attending the meeting fell “under restricted activities” of the Helms and Siljander Amendments. The next day, the Ministry of Health withdrew the 2012 guidelines, and soon after directed providers to stop safe abortion trainings, despite abortion where the mother’s health is in danger remaining a constitutional right in Kenya.<sup>75</sup> In Kenya, therefore, US abortion speech restrictions prevented foreign governments and civil society partners from engaging in necessary political speech activities about issues of public importance in their own country.

In summary, none of the US abortion speech restrictions demonstrate that limiting speech on the availability of legal healthcare or on issues of public debate in other countries is the least intrusive way to achieve a legitimate aim, directly related to that aim, or proportionate to the interest protected.

Overall, US abortion speech restrictions conflict with each requirement of the test for valid restriction of the right to freedom of speech under international law. First, their language remains vague and their consequences unclear to the point where they are not “provided by law.” The US government has created a chilling effect on abortion-related speech through overbroad application of these restrictions and by failing to clarify what speech and activities are allowed, preventing individuals and NGOs from knowing how to regulate their conduct. Second, the restrictions do not serve a legitimate aim, and negatively affect public health by limiting access to safe abortion services and information. Lastly, they are not necessary in a democratic society, and are instead ineffective at achieving any legitimate aim, limit democratic debate on the availability of and access to a human right and are disproportionate because their harm outweighs any US interest protected.

## V. US ABORTION RESTRICTIONS VIOLATE THE FREEDOM OF ASSOCIATION UNDER THE ICCPR

Article 22 of the ICCPR states that everyone has the right to freely associate with others.<sup>76</sup> This includes not only the right to form an association, but also the right of an association to carry out its statutory activities.<sup>77</sup> Article 22's protections extend to all activities of an association, which includes an NGO's right to access funding, as the ability to "secure and use resources is essential to the existence and effective operations of any association."<sup>78</sup> International law does not distinguish between sources of funding, so associations have the right to seek funding from domestic, foreign and international sources alike.<sup>79</sup>

Restrictions on the freedom of association, including those on an NGO's ability to access funding and resources, must adhere to the same basic requirements as restrictions on the freedom of speech under the ICCPR. Under Article 22 of the ICCPR, restrictions on the freedom of association, like those on the freedom of speech, are only permitted when they: (1) are provided by law; (2) have a legitimate aim; and (3) are necessary in a democratic society and proportionate to achieving that aim.<sup>80</sup>

The funding limitations imposed by US abortion restrictions do not comply with the test established by the ICCPR because they are not "provided by law" with enough clarity for NGOs to pursue their activities accordingly, they do not pursue a legitimate aim, and neither are they necessary in a democratic society nor proportionate to a legitimate aim.

**To avoid onerous repetition, the following sections highlight the specific and unique ways US abortion restrictions fail Article 22's requirements—however it must be noted that the facts rendering the US in violation of Article 19's speech requirements can equally be made here in relation to Article 22 and freedom of association.**

### ***a. US Funding Restrictions on Association are not "Provided by Law" Because They are Unclear and Inconsistently Applied***

In order to be permissible under the first prong of the ICCPR's test, restrictions on the freedom of association must be "provided by law."<sup>81</sup> This has been interpreted to mean that abridgements on protected association activities must be accessible to the public and understandable to allow those affected to regulate their conduct.<sup>82</sup> Finally, restrictions are to be applied consistently in order to ensure fairness and transparency.<sup>83</sup>

US funding restrictions on association are highly confusing and do not allow for protected persons or NGOs to know which conduct is permitted and which is prohibited. The use of the terms "motivate" and "actively promote" do not provide sufficient guidance about what activities or associations are permitted versus prohibited. Indeed, studies show that parties subjected to US abortions restrictions are unclear about prohibited activities and mistakenly believe the restrictions constitute a complete ban on all abortion activities and associations.<sup>84</sup> Further, the continued misinterpretation of the Helms Amendment's language by USAID and the over-insertion of abortion-restrictive language in US funding contracts show the restrictions' capricious application and enforcement.<sup>85</sup> Thus, US restrictions on abortion related association are not "provided by law" in a manner that satisfies the first prong of the ICCPR's test.

### ***b. US Funding Restrictions on Association do not Serve a "Legitimate Aim" Under the ICCPR***

The second prong of the test for permissible restrictions on association requires that the state act to serve a legitimate aim.<sup>86</sup> The ICCPR specifically states that the only legitimate aims when restricting association are protecting the rights/freedoms of others, acting in the interest of national security/public order, or protecting public health or morals.<sup>87</sup> The Special Rapporteur on the rights to freedom of peaceful assembly and association has noted that neither the protection of national values nor the desire to ensure the "effectiveness" of aid are legitimate aims.<sup>88</sup> The Special Rapporteur has further explained that even if funding restrictions were enacted to pursue a legitimate aim, "misinterpretations by Governments of ownership or harmonization principles to require

associations to align themselves with Governments' priorities contradict one of the most important aspects of freedom of association, namely that individuals can freely associate for any legal purpose."<sup>89</sup>

The US has not provided a "legitimate aim" to justify its restrictions on abortion-related associations. Far from an attempt at protecting rights or public health, the Helms Amendment was a conservative reaction to the US Supreme Court's *Roe v. Wade* decision.<sup>90</sup> Similarly, the GGR was put in place because "the US does not consider abortion an acceptable element of family planning programs."<sup>91</sup> These objectives do not fit within the limited aims described by Article 22 for permissibly regulating the freedom of association.

Further, abortion restrictions are directly deleterious to public health—having been shown to increase unsafe abortion rates and decrease women's access to necessary healthcare and medical treatment.<sup>92</sup>

The US has tried to justify the Global Gag Rule and other similar restrictions on the basis of aid effectiveness and government policy priorities.<sup>93</sup> However, as the Special Rapporteur explicitly noted, these are not legitimate aims. Funding restrictions violate an NGO's right to freedom of association by curbing access to resources they need to exist and operate as an organization. When an NGO is not allowed to seek and secure funding, it also loses its ability to provide essential services in line with its mission and to advocate for human rights and is forced to align with US priorities.<sup>94</sup>

For these reasons, US restrictions on abortion do not to serve a legitimate aim and fail the second prong of the ICCPR's test.

### ***c. US Funding Restrictions on Association are Neither "Necessary" in a Democratic Society nor "Proportionate" to a Legitimate Aim***

The final prong of the test for permissible restrictions on association requires that abrogations of the right be necessary in a democratic society and proportionate to a legitimate aim (for more discussion on what constitutes a "legitimate aim" see above).<sup>95</sup>

First, the US funding restrictions on association are not necessary to a democratic society. To be "necessary," limitations must be the least intrusive means to achieve the desired legitimate objective.<sup>96</sup> The US abortion restrictions are not the least intrusive means to achieve a legitimate aim. As noted above, there is no "legitimate aim" that these restrictions are serving. Further, the vagueness of the terms "motivate," "lobbying," and "actively promote" in Helms, Siljander, and the GGR and the general confusion regarding what activities and speech is allowed have led to a chilling effect on grantees' activities and self-censorship beyond what is required by the restrictions, as NGOs fear their activities being characterized as "promoting" abortion.<sup>97</sup>

Second, the US funding restrictions on association are not proportionate to achieving a legitimate aim. Again, there is no "legitimate aim" that the restrictions are aiming for. On the contrary, the funding restrictions applied by Helms, Siljander and the GGR have negatively impacted global healthcare and services far beyond counseling, advising, or performing abortion. One 2011 study found that the GGR actually increased abortion rates in sub-Saharan Africa, in large part because organizations supporting family planning and contraceptive access had to reduce their programming as a result of declining funding from the US.<sup>98</sup> Family planning clinics and healthcare providers have been forced to cut services or close, and clients have lost access to contraceptives and HIV prevention screenings.<sup>99</sup> In addition to limiting services, these restrictions limit the pursuit and distribution of information of public interest because they affect the use of research conducted to address public health issues including maternal morality and abortion.<sup>100</sup> US funding restrictions on association can prevent civil society organizations from engaging in the political process in their countries when abortion is at issue, and can also prevent foreign governments from funding abortion-related activities if they accept US government funding.<sup>101</sup> These are serious infringements on the freedom of association that extend to the realization of other human rights—from speech to health to non-discrimination.

The burden placed on organizations subject to US funding restrictions is also disproportionate to any interest protected. To comply with US abortion funding restrictions, organizations are required to adopt onerous



procedures, including training and monitoring compliance of their partners and subgrantees (under the GGR) and segregating their funds (under the Helms Amendment).<sup>102</sup> These procedures have the effect of chilling speech beyond required activities because grantees fear being found out of compliance, which can result in contract termination and a requirement to pay back funds that many NGOs can ill afford.<sup>103</sup> The high burden and risk these procedures and unclear requirements place on organizations was noted in the US State Department's recent review of the Global Gag Rule and its implementation.<sup>104</sup> This burden is comparable to those created by lengthy or arbitrary registration requirements, which have been found to violate the freedom of association in international law.<sup>105</sup>

Restricting the ability of NGOs to access and use funding from other sources violates the right to freedom of association guaranteed by Article 22 of the ICCPR because it prevents organizations engaged in abortion speech and activities from securing resources essential to their operation. These restrictions are not adequately provided by law, do not serve a legitimate aim, and are not necessary in a democratic society. Instead, they discriminate against organizations working on certain human rights issues, limit participation in the democratic process by those organizations, restrict democratic debate about how best to achieve human rights obligations in other countries, and inhibit the study and provision of necessary health services.

## **VI. CONCLUSION: US ABORTION SPEECH RESTRICTIONS VIOLATE THE FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION UNDER INTERNATIONAL LAW**

The US is obligated under the ICCPR and other international human rights instruments to respect the rights of individuals and organizations to freedom of speech and association, including the right to access funding to carry out association activities. Abortion-related restrictions imposed by the Helms and Siljander Amendments, and by the Global Gag Rule, violate these human rights and impermissibly restrict abortion-related speech and activities in contravention to the requirements of international law.

Under international law, restrictions on speech and association are only allowed under limited circumstances: when they are provided by law, pursue a legitimate aim, and are necessary in a democratic society. Restrictions under Helms, Siljander, and the Global Gag Rule fail each prong of this strict test and therefore violate both the freedom of speech and association requirements of the ICCPR. US abortion restrictions are not provided by law with enough clarity to allow individuals and organizations subject to them to know which speech and activities remain allowed. The US government itself has noted the remaining confusion in this area and studies of the restrictions' implementation have found that they create a chilling effect on speech and activities that remain legal (such as abortion in cases of threat to life, rape or incest) and are over-enforced by US agencies. The restrictions have not been enacted to pursue a legitimate aim, such as national security or public health, and on the contrary negatively affect public health by decreasing access to necessary healthcare even beyond abortion. Lastly, the restrictions are not "necessary" to achieving a legitimate aim as they are ineffective at lowering abortion rates, are overly intrusive, and disproportionately infringe on the rights to free speech and association. They impermissibly limit the democratic process, including by limiting debate on amending national law to comply with international human rights obligations on non-discriminatory access to care and the right to health. They have been applied to all global health assistance (Gag Rule) and all foreign assistance (Helms and Siljander) and are therefore far out of proportion to any stated family-planning objectives (though those objectives are not legitimate aims under the ICCPR).

The restrictions on abortion-related speech and funding imposed by Helms, Siljander and the Global Gag Rule limit the work of doctors, health professionals, experts, advocates and others and prevent the realization of other human rights in violation of international law. Abortion censorship created by funding restrictions on speech, public debate, legislative reform and advocacy on a particular human rights issue "violate[s] the key democratic principles of 'pluralism, tolerance, and broadmindedness.'"<sup>106</sup> By restricting abortion-related activities, speech and financial resources, the US has violated its fundamental obligations under international law to ensure free speech and association.

## ENDNOTES

1. Section 104(f)(1) of the Foreign Assistance Act of 1961, P.L. 87-195, 22 U.S.C. § 2151b(f)(1) as amended by the Foreign Assistance Act of 1971, P.L. 93-189 (Dec. 17, 1973). FY2016 State-Foreign Operations Appropriations Act, Division K of the 2016 Consolidated Appropriations Act, P.L. 114-113, 129 Stat. 2242, 2717.
2. Despite being an explicit limitation of the Helms Amendment, the Leahy Amendment is little understood by grantees, and “information and counseling on abortion is either incorrectly understood as being prohibited or is otherwise avoided.” IPAS & IBIS REPRODUCTIVE HEALTH, U.S. FUNDING FOR ABORTION: HOW THE HELMS AND HYDE AMENDMENTS HARM WOMEN AND PROVIDERS 7 (Mar. 2016).
3. Congress has expanded the impact of the Helms Amendment by habitually including its language in foreign assistance appropriations measures. LUISA BLANCHFIELD, CONG. RESEARCH SERV., R41360, ABORTION AND FAMILY PLANNING-RELATED PROVISIONS IN U.S. FOREIGN ASSISTANCE LAW AND POLICY 3 (Jan. 24, 2017).
4. *Mexico City Policy: An Explainer*, KAISER FAMILY FOUND. (June 1, 2017), <https://www.kff.org/global-health-policy/fact-sheet/mexico-city-policy-explainer>.
5. BLANCHFIELD, CONG. RESEARCH SERV., ABORTION AND FAMILY PLANNING-RELATED PROVISIONS 10-11.
6. Section 525 of the Foreign Assistance and Related Appropriations Act 1982, P.L. 97-121, 95 Stat. 1657 (Dec. 29, 1981).
7. The GGR prohibits US funds received by foreign NGOs from being used to perform or promote abortion “as a method of family planning.” Instances where abortion is performed or promoted in cases of rape, incest, and the life of the mother are not considered to be taken “as a method of family planning.” Memorandum from Pres. Bush to the Adm’r. of the U.S. Agency for Int’l Dev., Restoration of the Mexico City Policy, 66 F.R. 17303, 17306 (Mar. 28, 2001).
8. Guidelines on implementing the GGR have stated that “passively responding” to a woman’s question on where she might obtain a safe, legal abortion if she is already pregnant and has decided to obtain an abortion and if medical ethics require a response is not considered “active promotion.” Memorandum from Pres. Bush to the Adm’r. of the U.S. Agency for Int’l Dev., Restoration of the Mexico City Policy, at 17306.
9. Congressional abortion restrictions on foreign assistance, including the Helms Amendment, coupled with presidential authority over foreign affairs are what grant the US president the ability to unilaterally impose this policy. If congressional restrictions were repealed, the president would almost certainly not have the ability to impose the GGR without congressional approval.
10. Memorandum from Pres. Donald Trump to the Sec’y of State, Sec’y of Health and Human Servs., and the Adm’r of the U.S. Agency for Int’l Dev. on the Mexico City Policy (Jan. 23, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-regarding-mexico-city-policy/>.
11. *FAQ: How US Abortion Restrictions on Foreign Assistance, Including the Global Gag Rule, Violate Women’s Rights and Human Rights*, GLOBAL JUSTICE CTR. (Jan. 2018), <http://globaljusticecenter.net/files/FAQAbortionRestrictions.pdf>.
12. International Covenant on Civil and Political Rights arts. 19, 22, Mar. 23 1976, 999 U.N.T.S. 171; American Declaration on the Rights and Duties of Man arts. IV, XXII, May 2, 1948, OEA/Ser.L./V.II.23, doc. 21, rev. 6; Inter-American Convention on Human Rights arts. 13, 16, Nov. 22, 1969, 1144 U.N.T.S. 13; Council of Europe, European Convention on Human Rights arts. 10, 11, Nov. 4, 1950, E.T.S. 5; International Convention on the Elimination of All Forms of Racial Discrimination art. 5, Mar. 7, 1966, 660 U.N.T.S. 195.
13. The United States specifically noted that while the Covenant allows for restriction of fundamental rights in certain circumstances, such as in Article 19(3), State Parties “should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant.” U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (Apr. 2, 1992).
14. The UN Human Rights Committee has consistently held that in special circumstances, persons may fall under the subject matter jurisdiction of a State party even when outside that state’s territory, including circumstances in which a State party has effective control over an individual as it pertains to certain substantive rights protected by the Covenant, such as abortion. Human Rights Comm., Concluding Observations — United States (1995), ¶ 284, CCPR/C/79/Add.50 (“The Committee does not share the view expressed by the Government that the Covenant lacks extraterritorial reach under all circumstances. Such a view is contrary to the consistent interpretation of Committee on this subject, that, in special circumstances, persons may fall under the subject-matter jurisdiction of a State party even when outside the State’s territory.”); Human Rights Comm., Communication No. 196/1985, Ibrahima Gueye et al. v. France, U.N. Doc. CCPR/C/35/D/196/1985 (Apr. 6, 1989); Human Rights Comm., General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). See also, Universal Declaration of Human Rights arts. 2, 7, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (equal protection, non-discrimination, and no distinction based on political, jurisdictional, or international status of territory to which a person belongs); International Covenant on Civil and Political Rights art. 2 (“within its territory and subject to its jurisdiction”); U.N. Charter arts. 55-56 (describing Member States’ obligations to cooperate in promoting “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction”).
15. International Covenant on Civil and Political Rights arts. 19, 22.
16. Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, Int’l Law Comm’n, ¶ 8, U.N. Doc. A/HRC/23/39 (Apr. 24, 2013) (by Maina Kiai).
17. International Covenant on Civil and Political Rights art. 2(2); Human Rights Comm., General Comment No. 31, ¶¶ 13-14.
18. Human Rights Comm., General Comment No. 31, ¶ 2.
19. International Covenant on Civil and Political Rights arts. 19(3), 22(2); Human Rights Comm., General Comment No. 34 on Article 19: Freedoms of Expression and Opinion, ¶¶ 21, 22, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) (noting that restrictions must remain the exception to the human rights norm of freedom of expression, not putting “in jeopardy the right itself”); International Covenant on Civil and Political Rights arts. 4, 5 (derogation in times of public emergency and that the Covenant should not be interpreted as allowing activities aimed at the destruction of human rights or to permit restrictions upon fundamental rights existing in State Parties “pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent”); Universal Declaration of Human Rights arts. 29, 30 (“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”).
20. 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 9 (“undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole”); Human Rights Comm., General Comment No. 34, ¶¶ 3-4; Universal Declaration of Human Rights arts. 12, 25 (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”) (right to medical care and a standard of living adequate for health and well-being); International Covenant on Civil and Political Rights arts. 6, 7, 17 (right to life, freedom from torture, and that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.”); *Factsheet: The Global Gag Rule and Human Rights*, CTR. FOR REPRODUCTIVE RIGHTS (Jan. 2018), <https://www.reproductiverights.org/sites/crr.civicaactions.net/files/documents/GLP-GGR-FS-0118-Web.pdf>.
21. International Covenant on Civil and Political Rights art. 19. See also, *Sunday Times v. United Kingdom*, App. No. 6538/74, Eur. Ct. H.R. ¶¶ 65-66 (1979) (noting the right

to impart ideas and information includes the right of the public to receive them).

22. International Covenant on Civil and Political Rights art. 19(3). These requirements have been further elaborated by the Human Rights Committee (the body responsible for monitoring implementation of the ICCPR and interpreting the substance of its human rights protections). The freedom of speech provisions in regional human rights conventions also provide interpretive guidance. European Convention on Human Rights art. 10(2)(the European Convention provides additional aims that are considered legitimate, such as territorial integrity and information received in confidence); Inter-American Convention on Human Rights art. 13(2)-(3)(including an additional explanation that freedom of expression cannot be “restricted by indirect methods or means” “tending to impede the communication and circulation of ideas and opinions”).
23. Human Rights Comm., General Comment No. 34, ¶¶ 24-25; Human Rights Comm., General Comment No. 27 on Article 12: Freedom of Movement, ¶ 13, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (Nov. 1, 1999); see also The Word “Laws” in Article 30 of the American Convention on Human Rights, Advisory Opinion, OC-6/86, Inter-Am. Ct. H.R. ¶¶ 22, 27 (May 9, 1986).
24. Human Rights Comm., General Comment No. 34, ¶¶ 24-25.
25. A 2016 study by Ipas and Ibis Reproductive Health found “no evidence of counseling on abortion provided by US funded reproductive health providers.” IPAS & IBIS REPRODUCTIVE HEALTH, US. FUNDING FOR ABORTION: HOW THE HELMS AND HYDE AMENDMENTS HARM WOMEN AND PROVIDERS, at 7.
26. See Alan Guttmacher Inst. v. McPherson, 805 F.2d 1088 (2d Cir. 1986) (“AGI II”); Akila Radhakrishnan & Kristina Kallas, *If These Walls Could Talk, They Would Be Censored: U.S. Restrictions on Pro-Choice Speech*, Reproductive Laws for the 21st Century Papers, Ctr. for Women Pol’y Studies 8-11 (June 2012).
27. GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: FOREIGN ASSISTANCE, CLEARER GUIDANCE NEEDED ON COMPLIANCE OVERSEAS WITH LEGISLATION PROHIBITING ABORTION-RELATED LOBBYING, GAO-12-35 (Oct. 2011) (examining the Siljander Amendment’s interaction with civic education and constitutional reform activities by US-funded award recipients in Kenya).
28. IPAS & IBIS REPRODUCTIVE HEALTH, US. FUNDING FOR ABORTION: HOW THE HELMS AND HYDE AMENDMENTS HARM WOMEN AND PROVIDERS, at 7.
29. See Toby Mendel, Ctr. For Law & Democracy, *Restricting Freedom of Expression: Standards and Principles*, Background Paper for Meetings Hosted by the UN Special Rapporteur on Freedom of Opinion and Expression 10-12 (2010), <http://www.law-democracy.org/wp-content/uploads/2010/07/10.03.Paper-on-Restrictions-on-FOE.pdf>.
30. Human Rights Comm., General Comment No. 27, ¶ 12.
31. Akila Radhakrishnan & Kristina Kallas, *If These Walls Could Talk, They Would Be Censored*, at 8-9; GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: FOREIGN ASSISTANCE, CLEARER GUIDANCE NEEDED, at 15-20.
32. GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: FOREIGN ASSISTANCE, CLEARER GUIDANCE NEEDED, at “Highlights”, 15-16.
33. *Background Briefing: Senior Administration Officials on Protecting Life in Global Health Assistance*, U.S. DEP’T OF STATE (May 15, 2017), <https://www.state.gov/r/pa/prs/ps/2017/05/270879.htm> (“At any time, in consultation with the Secretary of Health and Human Services, the Secretary of State may authorize additional case-by-case exemptions to the policy.”)
34. USAID, USAID Guidance for Implementing the Siljander Amendment (Prohibition on Lobbying For or Against Abortion) (May 22, 2014), <https://www.usaid.gov/sites/default/files/documents/1864/USAID%20Guidance%20for%20Implementing%20the%20Siljander%20Amendment.pdf>.
35. USAID, USAID Guidance for Implementing the Siljander Amendment.
36. USAID, Standard Provisions for Non-U.S. Nongovernmental Organizations: A Mandatory Reference for ADS Chapter 303 (revised Oct. 4, 2017), § RAA29 (a)(1)(10)(iii) (A), <https://www.usaid.gov/sites/default/files/documents/1868/303mab.pdf>.
37. Akila Radhakrishnan & Kristina Kallas, *If These Walls Could Talk, They Would Be Censored*, at 8-11; Akila Radhakrishnan et al., *Commentary, Protecting Safe Abortion in Humanitarian Settings: Overcoming Legal and Policy Barriers*, REPRODUCTIVE HEALTH MATTERS, Nov. 2017, at 40, 40-47; Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, GUTTMACHER INST. (Sept. 13, 2013), <https://www.guttmacher.org/gpr/2013/09/abortion-restrictions-us-foreign-aid-history-and-harms-helms-amendment>.
38. KEITH WERHAN, FREEDOM OF SPEECH: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 146 (2004) (citing *Smith v. Goguen*, 415 U.S. 566 (1974)).
39. Human Rights Comm., General Comment No. 34, ¶ 22.
40. International Covenant on Civil and Political Rights art. 19(3).
41. Human Rights Comm., General Comment No. 34, ¶ 27 (noting the State party’s obligation to demonstrate the legal basis for restrictions).
42. Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid*; Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women’s Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PENN. J. CONST. L. 752, 773-77 (2004).
43. Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session), Mexico City, Aug. 6-14, 1984, <https://abortion.procon.org/sourcefiles/MexicoCityPolicy1984.pdf>.
44. See generally Jeffrey B. Bingenheimer & Patty Skuster, *Commentary, The Foreseeable Harms of Trump’s Global Gag Rule*, 48 STUD. FAMILY PLANNING 279 (2017) (examining scientific and policy bases for criticism of the Global Gag Rule’s negative effect on health, failure to reduce abortion rates, and interference with progress on human rights obligations).
45. *Women and Girls Continue to be at Risk of Unsafe Abortion*, WORLD HEALTH ORG. (Sept. 28, 2017), [http://www.who.int/reproductivehealth/topics/unsafe\\_abortion/abortion-safety-estimates/en/](http://www.who.int/reproductivehealth/topics/unsafe_abortion/abortion-safety-estimates/en/); *Abortion Rates Declined Significantly in the Developed World Between 1990 and 2014; Rates in the Developing World Have Remained Unchanged*, GUTTMACHER INST. (May 11, 2016), <https://www.guttmacher.org/news-release/2016/abortion-rates-declined-significantly-developed-world-between-1990-and-2014>.
46. *Women and Girls Continue to be at Risk of Unsafe Abortion*, WORLD HEALTH ORG.; *Factsheet: Preventing Unsafe Abortion*, WORLD HEALTH ORG. (Jan. 2018), <http://www.who.int/mediacentre/factsheets/fs388/en/>.
47. Article 11 of the Declaration on Human Rights Defenders notes the right to lawfully exercise one’s profession and that those whose professions “can affect the human dignity, human rights and fundamental freedoms of others should respect those rights and freedoms and comply with relevant national and international standards of occupational and professional conduct or ethics.” Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms art. 11, G.A. Res. 53/144, Annex, U.N. Doc. A/RES/53/144 (Dec. 9, 1998); Report of the Special Rapporteur on the Situation of Human Rights Defenders, ¶¶ 36-37, U.N. Doc. A/67/292 (Aug. 10, 2012) (by Margaret Sekaggya).
48. See, e.g., Sneha Barot & Susan A. Cohen, *The Global Gag Rule and Fights over Funding UNFPA: The Issues that Won’t Go Away*, GUTTMACHER POL’Y REV., Spring 2015, at 27, 29-30; IPAS & IBIS REPRODUCTIVE HEALTH, US. FUNDING FOR ABORTION: HOW THE HELMS AND HYDE AMENDMENTS HARM WOMEN AND PROVIDERS, at 7; Mehlika Hoodbhoy, Martin Flaherty & Tracy Higgins, *Exporting Despair: The Human Rights Implications of U.S. Restrictions on Foreign Health Care Funding in Kenya*, 29 FORDHAM INT’L L.J. 1 (2005); LEITNER CTR. FOR INT’L LAW & JUSTICE, EXPORTING CONFUSION: U.S. FOREIGN POLICY AS AN OBSTACLE TO THE IMPLEMENTATION OF

ETHIOPIA'S LIBERALIZED ABORTION LAW (2010); *Letter to Secretary of State Rex Tillerson Re: Early Impact of the Protecting Life in Global Health Assistance Policy in Kenya and Uganda*, HUMAN RIGHTS WATCH (Oct. 13, 2017), <https://www.hrw.org/news/2017/10/26/re-early-impact-protecting-life-global-health-assistance-policy-kenya-and-uganda>; Skye Wheeler, *Cruel Choices: How Trump's Global Gag Rule Hurts the Fight Against HIV*, HUMAN RIGHTS WATCH (Dec. 8, 2017), <https://www.hrw.org/news/2017/12/08/cruel-choices-how-trumps-global-gag-rule-hurts-fight-against-hiv>.

49. Human Rights Comm., General Comment No. 34, ¶¶ 28, 30.

50. USAID, Development Objective Agreement and Bilateral Project Agreement Template (revised July 28, 2014), Annex 2, art. F, § F.2, [https://www.usaid.gov/sites/default/files/documents/1868/35omac\\_o.pdf](https://www.usaid.gov/sites/default/files/documents/1868/35omac_o.pdf).

51. USAID, USAID Guidance for Implementing the Siljander Amendment.

52. USAID, Standard Provisions for Non-U.S. Nongovernmental Organizations, § RAA29 (a)(l)(10)(iii)(A)(III)-(IV).

53. See, e.g., Concluding Observations – Poland (2004), CCPR/CO/82/POL, ¶8; Concluding Observations – Guatemala (2001), CCPR/CO/72/GTM, ¶19; Concluding Observations – Nicaragua (2008), CCPR/C/NIC/CO/3, ¶13; Concluding Observations – Ecuador (1998), CCPR/C/79/Add.92, ¶11; Concluding Observations – Argentina (2000), CCPR/CO/70/ARG, ¶14; Concluding Observations – Peru (2000), CCPR/CO/70/PER, ¶20; Concluding Observations – Chile (1999), CCPR/C/79/Add.104, ¶15.

54. See Alan Guttmacher Inst. v. McPherson, 805 F.2d 1088 (2d Cir. 1986) (“AGI II”); Akila Radhakrishnan & Kristina Kallas, *If These Walls Could Talk, They Would Be Censored*, at 8-11.

55. Human Rights Comm., General Comment No. 34, ¶ 35 (necessity and proportionality can be demonstrated “in particular by establishing a direct and immediate connection between the expression and the threat”); Human Rights Comm., *Mr. Jeong-Eun Lee v. Republic of Korea*, Communication No. 1199/2002, ¶ 7.3, U.N. Doc. CCPR/84/D/1119/2002 (2005); Human Rights Comm., *Woman Mukong v. Cameroon*, Communication No. 458/1991, ¶ 9.7, U.N. Doc. CCPR/C/51/D/458/1991 (1994).

56. Human Rights Comm., General Comment No. 34, ¶¶ 2, 3, 34; International Covenant on Civil and Political Rights arts. 14, 21, 22(2), Inter-American Convention on Human Rights art. 15, 16(2), 22(3), European Convention arts. 6(1), 8(2), 9(2), 10(2), 11(2). The European Court, for example, has noted that “freedom of expression is also applicable to ‘information’ or ‘ideas’ that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society.’” *Open Door and Dublin Well Woman v. Ireland*, 64/1991/316/387-388, Eur. Ct. H.R. ¶ 71 (Sept. 23, 1992). The European Court also requires restrictions on the freedom of speech to serve a “pressing social need” in recognition of the important interests protected by the right to free speech. *Sunday Times v. United Kingdom*, ¶ 62. The Inter-American Court has used the phrase “compelling government interest.” *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention of Human Rights), Advisory Opinion, ¶ 46.

57. Human Rights Comm., General Comment No. 34, ¶ 33.

58. Human Rights Comm., General Comment No. 34, ¶ 34;

59. See, e.g., Special Rapporteur for Freedom of Expression, Inter-Am. Comm’n H.R., *Inter-American Legal Framework Regarding the Right to Freedom of Expression*, ¶¶ 67, 87, OEA/SER.L/V/III CIDH/RELE/INF. 2/09 (Dec. 30, 2009); Janneke Gerards, *How to Improve the Necessity Test of the European Court of Human Rights*, 11 INT’L J. CONST. L. 466, 473-81 (2013) (described as the “test of effectiveness”).

60. Human Rights Comm., General Comment No. 34, ¶¶ 22, 35.

61. Human Rights Comm., General Comment No. 34, ¶¶ 20, 23, 34 (“The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential.”); Human Rights Comm., General Comment No. 27, ¶ 14.

62. See, e.g., *Open Door and Dublin Well Woman v. Ireland*, ¶¶ 70-77 (finding an injunction that prohibited providing information to pregnant women on abortion facilities abroad disproportionate, noting its “sweeping” prohibition regardless of women’s personal situation, the fact that the restriction “limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman’s health and well-being,” and that the injunction created serious health risks for women seeking abortions).

63. *Fact Sheet: Protecting Life in Global Health Assistance*, U.S. DEP’T OF STATE (May 15, 2017), <https://www.state.gov/r/pa/prs/ps/2017/05/270866.htm>.

64. GOV’T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS: FOREIGN ASSISTANCE, CLEARER GUIDANCE NEEDED (examining the Siljander Amendment’s interaction with civic education and constitutional reform activities by US-funded award recipients in Kenya); OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF STATE, REVIEW OF DEPARTMENT OF STATE ACTIVITIES CONCERNING THE DRAFT KENYA CONSTITUTION, ISP-I-10-77 (Aug. 2010).

65. Memorandum from Pres. Donald Trump to the Sec’y of State, Sec’y of Health and Human Servs., and the Adm’r of the U.S. Agency for Int’l Dev. on the Mexico City Policy.

66. *Abortion Rates Declined Significantly in the Developed World Between 1990 and 2014; Rates in the Developing World Have Remained Unchanged*, GUTTMACHER INST.; see, e.g., Sneha Barot & Susan A. Cohen, *The Global Gag Rule and Fights over Funding UNFPA: The Issues that Won’t Go Away*, at 27, 29-30; IPAS & IBIS REPRODUCTIVE HEALTH, U.S. FUNDING FOR ABORTION: HOW THE HELMS AND HYDE AMENDMENTS HARM WOMEN AND PROVIDERS, at 7; Mehlika Hoodbhoy et al., *Exporting Despair*; LEITNER CTR. FOR INT’L LAW & JUSTICE, EXPORTING CONFUSION; *Letter to Secretary of State Rex Tillerson*, HUMAN RIGHTS WATCH; Skye Wheeler, *Cruel Choices: How Trump’s Global Gag Rule Hurts the Fight Against HIV*.

67. *Open Door and Dublin Well Woman v. Ireland*, ¶ 76 (“Accordingly, information that the injunction sought to restrict was already available elsewhere although in a manner which was not supervised by qualified personnel and thus less protective of women’s health. Furthermore, the injunction appears to have been largely ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain”).

68. *Mexico City Policy: An Explainer*, KAISER FAMILY FOUND.; Barbara B. Crane & Jennifer Dusenberry, *Power and Politics in International Funding for Reproductive Health: the US Global Gag Rule*, REPRODUCTIVE HEALTH MATTERS, Oct. 30, 2004, at 128, 129-30 (2004).

69. Human Rights Comm., General Comment No. 34, ¶¶ 2-3; Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Expression and Opinion, ¶ 5, U.N. Doc. A/71/373 (Sept. 6, 2016) (by David Kaye).

70. See *Roe v. Wade*, 410 U.S. 113, at 155, 164 (1973) (situating abortion decisions within the Fourteenth Amendment’s Due Process Clause and implicit right to privacy).

71. Human Rights Comm., General Comment No. 34, ¶¶ 11, 23, 28, 30. See also, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, ¶ 81, U.N. Doc. A/HRC/14/23 (Apr. 20, 2010) (by Frank La Rue) (“restrictions on the following aspects of the right to freedom of expression are not permissible: (i) Discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups; (ii) The free flow of information and ideas, including practices such as the banning or closing of publications or other media and the abuse of administrative measures and censorship. . . .”) (citing Human Rights Council Res. 12/16, ¶ 5(p), U.N. Doc. A/HRC/RES/12/16 (Oct. 12, 2009)).

72. CTR. FOR REPRODUCTIVE RIGHTS, IN HARM’S WAY: THE IMPACT OF KENYA’S RESTRICTIVE ABORTION LAW 25 (2010), [https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/InHarmsWay\\_2010.pdf](https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/InHarmsWay_2010.pdf);

REPUBLIC OF KENYA MINISTRY OF HEALTH, INCIDENCE AND COMPLICATIONS OF UNSAFE ABORTION IN KENYA: KEY FINDINGS OF A NATIONAL STUDY 25 (2013), <http://aphrc.org/wp-content/uploads/2013/11/>



- Incidence-and-Complications-of-Unsafe-Abortion-in-Kenya-Key-Findings-of-a-National-Study.pdf; Gilda Sedgh et al., *Abortion Incidence Between 1990 and 2014: Global, Regional, and Subregional Levels and Trends*, 388 LANCET 258, 263 (2016).
73. Constitution, art. 26 (2010) (Kenya). Health is “defined broadly” in Kenya to include “physical, mental and social well-being.” The Health Act, No. 21 (2017), Kenya Gazette Supplement No. 101 § 2. The 2017 Health Act also guarantees the right to information about and access to reproductive health services, including “affordable and acceptable” family planning services. The Health Act, No. 21 (2017) § 6(1)(a).
74. REP. OF KENYA MINISTRY OF HEALTH, INCIDENCE AND COMPLICATIONS OF UNSAFE ABORTION IN KENYA, at 8, 27.
75. Laura Bassett, *Instruments of Oppression*, HUFFINGTON POST, <http://highline.huffingtonpost.com/articles/en/kenya-abortion/>; Ipas, Briefing Note: The Helms Amendment and USAID Censorship and Intimidation in Reproductive Health in Kenya (Feb. 28, 2014) (on file with author). The United States is the largest single contributor in financial support to the health sector in Kenya. Laura Bassett, *Instruments of Oppression*.
76. International Covenant on Civil and Political Rights art. 22.
77. Human Rights Comm., *Korneenko v. Belarus*, Communication No. 1274/2004, U.N. Doc. CCPR/C/88/D/1274/2004 (2006).
78. 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 8. See also, *General Principles: Protecting Civic Space and the Right to Access Resources*, FORMER U.N. SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION (May 28, 2014), <http://freeassembly.net/news/general-principles-right-to-funding/>; *Factsheet: Civil Society’s Ability to Access Resources*, FORMER U.N. SPECIAL RAPPORTEUR ON THE RIGHTS TO FREEDOM OF PEACEFUL ASSEMBLY AND OF ASSOCIATION (May 2015), <http://freeassembly.net/wp-content/uploads/2015/05/Funding-report-factsheet-final.pdf>; Report of the Special Rapporteur on the Situation of Human Rights Defenders, ¶¶ 91-93, U.N. Doc. A/64/226 (Aug. 4, 2009) (by Margaret Sekaggya).
79. 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 8; Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms art. 13; Human Rights Council Res. 22/6, Protecting Human Rights Defenders, ¶ 9(b), U.N. Doc. A/HRC/RES/22/6 (Apr. 12, 2013).
80. International Covenant on Civil and Political Rights art. 22(2); 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 23. See above sections ¶ IV for a more detailed analysis of these requirements. ICCPR Article 22(2) uses the phrase “necessary in a democratic society.”
81. International Covenant on Civil and Political Rights art. 22(2).
82. 2012 Report of the Special Rapporteur on the Situation of Human Rights Defenders, ¶¶ 64, 67.
83. 2012 Report of the Special Rapporteur on the Situation of Human Rights Defenders, ¶¶ 66-67.
84. IPAS & IBIS REPRODUCTIVE HEALTH, US. FUNDING FOR ABORTION: HOW THE HELMS AND HYDE AMENDMENTS HARM WOMEN AND PROVIDERS, at 7.
85. CTR. FOR HEALTH & GENDER EQUITY, ISSUE BRIEF: THE LEGAL LANDSCAPE FOR ABORTION PROVISION IN U.S. FOREIGN ASSISTANCE 13 (2013), [http://www.genderhealth.org/files/pdfs/FINAL\\_ISSUE%20BRIEF.pdf](http://www.genderhealth.org/files/pdfs/FINAL_ISSUE%20BRIEF.pdf).
86. International Covenant on Civil and Political Rights art. 22(2); 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 23.
87. International Covenant on Civil and Political Rights art. 22(2); see also Human Rights Comm., General Comment No. 31, ¶ 6.
88. 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶¶ 27, 30, 34, 40-41.
89. 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 41.
90. Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid*; Julia L. Ernst et al., *The Global Pattern of U.S. Initiatives Curtailing Women’s Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PENN. J. CONST. L. 752, 773-77 (2004).
91. Policy Statement of the United States of America at the United Nations International Conference on Population (Second Session), Mexico City.
92. See, e.g., Sneha Barot & Susan A. Cohen, *The Global Gag Rule and Fights over Funding UNFPA: The Issues that Won’t Go Away*, at 27, 29-30; IPAS & IBIS REPRODUCTIVE HEALTH, US. FUNDING FOR ABORTION: HOW THE HELMS AND HYDE AMENDMENTS HARM WOMEN AND PROVIDERS, at 7; Mehlika Hoodbhoy et al., *Exporting Despair*; LEITNER CTR. FOR INT’L LAW & JUSTICE, EXPORTING CONFUSION; *Letter to Secretary of State Rex Tillerson*, HUMAN RIGHTS WATCH; Skye Wheeler, *Cruel Choices: How Trump’s Global Gag Rule Hurts the Fight Against HIV*.
93. See, e.g., D.K.T. Int’l, Inc. v. U.S. Agency for Int’l Dev., 477 F.3d 758, 762 (D.C. Cir. 2007) (“The effectiveness of the government’s viewpoint-based program would be substantially undermined, and the government’s message confused, if the organizations hired to implement that program by providing HIV/AIDS programs and services to the public could advance an opposite viewpoint in their privately-funded operations.”); Agency for Int’l Dev., v. Alliance for Open Soc’y Int’l, Inc., 133 S. Ct. 2321, 2331 (2013) (dismissing the government’s argument that the requirement at issue “is necessary because, without it, the grant of federal funds could free a recipient’s private funds ‘to be used to promote prostitution or sex trafficking.’”); Planned Parenthood Fed. of Am., Inc., v. Agency for Int’l Dev., 915 F.2d 59, 65 (2d Cir. 1990) (“Plaintiffs-appellants contend that AID could authorize the use of segregated accounts to allow foreign NGOs to accept restricted funds from AID while expending their own funds for abortion-related activities. While segregated accounts would be less restrictive than the Standard Clause, such accounts would not advance the policy that the United States will ‘withhold federal assistance from foreign nongovernmental organizations (“NGOs”) that perform or actively promote abortions, even if those activities are financed with non-federal funds.’”).
94. 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 9 (“undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole.”).
95. 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 35. See also ¶¶ 23, 48, 56, 59, 61, 66, 81(b).
96. 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 35.
97. POPULATION TECHNICAL ASSISTANCE PROJECT, MEXICO CITY POLICY IMPLEMENTATION STUDY 22 (Nov. 21, 1990), [http://pdf.usaid.gov/pdf\\_docs/PNABG765.pdf](http://pdf.usaid.gov/pdf_docs/PNABG765.pdf); The Mexico City Policy/Global Gag Rule: Its Impact on Family Planning and Reproductive Health: Hearing Before the Comm. on Foreign Affairs, 110th Cong. 18 (2007) (Prepared Statement of Duff G. Gillespie, Ph.D., Professor and Senior Scholar, Gates Institute for Population and Reproductive Health, Johns Hopkins Bloomberg School of Public Health).
98. Eran Bendavid, Patrick Avila, & Grant Miller, *United States Aid Policy and Induced Abortion in Sub-Saharan Africa*, BULLETIN OF THE WORLD HEALTH ORG., Sept. 27, 2011, <http://www.who.int/bulletin/volumes/89/12/11-091660/en/>.
99. *The Harmful Impact of the Global Gag Rule*, POPULATION ACTION INT’L (Oct. 10, 2017), <https://pai.org/wp-content/uploads/2017/10/GGR-Impact-One-Pager-3-2.pdf>; Sophie Edwards, *One Year On, Full Impact of ‘Global Gag Rule’ Begins to Emerge*, DEVEX (Jan. 19, 2018), <https://www.devex.com/news/one-year-on-full-impact-of-global-gag-rule-begins-to-emerge-91902>.
100. While the Standard Provisions for NGO and foreign government grantees state that “Epidemiologic or descriptive research to assess the incidence, extent, or consequences of abortions is not precluded,” US government training materials on the Global Gag Rule state that “the policy covers implementation-science research, operational or programmatic research, surveys, needs assessments and related capacity-building conducted for the purpose of making improvements to global



health assistance programs funded by the U.S. Government and implemented through a foreign NGO with a primary purpose or effect of benefitting a foreign country.” USAID, Protecting Life in Global Health Assistance and Statutory Abortion Restrictions eLearning Course (Jan. 2, 2018), <https://www.globalhealthlearning.org/course/protecting-life-global-health-assistance-and-statutory>; USAID, Development Objective Agreement and Bilateral Project Agreement Template, Section F.2(c); USAID, Standard Provisions for Non-U.S. Nongovernmental Organizations, § RAA22 (d)(2). See also Alan Guttmacher Inst. v. McPherson, 805 F.2d 1088 (2d Cir. 1986) (“AGI II”).

101. See USAID, Development Objective Agreement and Bilateral Project Agreement Template, Annex 2, art. F, § F.2 (requiring that abortion restrictions be included in subagreements and contracts, including “any Agreement that finances any democracy and governance activities that will support constitutional or any health-related legislative reform”).

102. Eran Bendavid et al., *United States Aid Policy and Induced Abortion in Sub-Saharan Africa*; Sophie Edwards, *One Year On, Full Impact of ‘Global Gag Rule’ Begins to Emerge; On the Hook: U.S. NGOs Responsible for Enforcing Trump’s Global Gag Rule*, POPULATION ACTION INT’L (Feb. 17, 2017), [http://pai.org/wp-content/uploads/2017/02/wash-memo\\_21717.pdf](http://pai.org/wp-content/uploads/2017/02/wash-memo_21717.pdf).

103. USAID, Standard Provisions for Non-U.S. Nongovernmental Organizations, § M10.

104. Protecting Life in Global Health Assistance Six Month Review, U.S. DEP’T OF STATE (Feb. 6, 2018), <https://www.state.gov/f/releases/other/278012.htm>.

105. 2009 Report of the Special Rapporteur on the Situation of Human Rights Defenders, ¶¶ 70-74 (describing “ever changing documentation requirements,” “excessive government control and discretion” and “vague legislation” as leading to government abuse and discretionary interpretation that can hamper or prevent the functioning of organizations.); CTR. FOR HUMAN RIGHTS, AM. BAR. ASS’N, INTERNATIONAL AND COMPARATIVE LAW ANALYSIS OF THE RIGHT TO AND RESTRICTIONS ON FOREIGN FUNDING OF NON-GOVERNMENTAL ORGANIZATIONS 13-14.

106. 2013 Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 41.