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# **PUBLIC HEALTH CRISES AND ABORTION: THE NEED FOR A REINTERPRETATION OF THE HELMS AMENDMENT’S “FAMILY PLANNING” PROVISION IN LIGHT OF THE ZIKA EPIDEMIC**

## INTRODUCTION

Women on the Web, a Canadian non-profit health care organization that specializes in reproductive access and medical care, received a significant uptick in email requests for the abortion pill in early 2016.<sup>1</sup> The emails, which largely came from women in South and Latin America, all had a similar theme: fear of giving birth to a child infected with the Zika virus.<sup>2</sup> One woman from Venezuela wrote, “I contracted Zika 4 days ago . . . I love children. But I don’t believe it is a wise decision to keep a baby who will suffer. I need an abortion. I don’t know who to turn to. Please help me ASAP.”<sup>3</sup> Other women who contacted Women on the Web requesting abortion services spoke of their “extremely difficult” economic situations and about the “overwhelming fear” of contracting the Zika virus in their local communities.<sup>4</sup> Requests for abortion services through Women on the Web are clearly only the tip of the iceberg. Using the website itself presumes that the woman seeking services has access to a computer, a luxury not available to many women in rural South and Latin America.<sup>5</sup> These emails to Women on the Web raise an important question: what is causing women to have to resort to online reproductive services as opposed to getting the health care in person in their home country? The answer may trace, in part, to U.S. foreign policy.

Globally, there has been a significant backsliding in reproductive rights for women, encouraged, in part, by the implementation of anti-choice U.S. foreign

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<sup>1</sup> In Brazil, requests over a three-month period for the abortion pill doubled. Requests from Ecuador, Venezuela, and Honduras saw increases above seventy percent. There was a thirty percent increase in requests from Colombia, El Salvador, and Costa Rica. Nurith Aizenman, *Has Zika Pushed More Women Toward Illegal Abortions?*, NPR (June 22, 2016).

<sup>2</sup> See Laurel Raymond, *Women in Zika-Plagued Countries Are Begging for Abortions. It Could Be the Tip of the Iceberg*, THINK PROGRESS (June 24, 2016), <https://thinkprogress.org/women-in-zika-plagued-countries-are-begging-for-abortions-it-could-be-the-tip-of-the-iceberg-e8b2fc618e0#uax4aslby>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

policies.<sup>6</sup> The overall curtailment of reproductive rights is troubling because it constitutes a major restriction of the autonomy of women abroad. Of specific concern, however, is the way that U.S. foreign assistance laws regarding abortion hamper an effective international response to the Zika virus, a major global public health crisis. Particularly, the Helms Amendment to the Foreign Assistance Act of 1961 prohibits the use of U.S. foreign aid money to “pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions.”<sup>7</sup> The Helms Amendment is just one component of a series of laws collectively referred to as the “Global Gag Rule,”<sup>8</sup> because the laws prevent other countries and non-governmental organizations from even talking about abortion to women that come in for health care services. This Comment will focus particularly on the Helms Amendment and the effect its provisions have on the response to the Zika virus in Latin America.

The language in the Helms Amendment has been interpreted in an incredibly broad manner by Congress and executive agencies.<sup>9</sup> The effect of the provision, although written to eliminate abortion as a method of family planning, has been interpreted by the U.S. Agency for International Development and Congress to eliminate assistance for all abortions and abortion-related services abroad.<sup>10</sup> In essence, even when a woman is not using abortion as a method of family planning, she can receive no assistance from the United States for her abortion. As a result of the broad interpretation of the Helms Amendment, there have been repeated calls from reproductive rights groups to solidify exceptions to the Helms Amendment to allow funding for abortion services where the woman has been raped, is pregnant as a product of incest, or is gravely endangered by her pregnancy.<sup>11</sup> Reproductive rights advocates have also called to repeal the Helms Amendment altogether.<sup>12</sup> While an overall repeal would likely be the most effective way to eliminate the harms caused by the Helms Amendment abroad because it would allow other countries and non-governmental organizations to

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<sup>6</sup> Julia Ernst, Laura Katzive & Erica Smock, *Symposium The Legacy of Roe: The Constitution, Reproductive Rights, and Feminism: The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 753–54 (2004).

<sup>7</sup> LUISA BLANCHFIELD, CONG. RESEARCH SERV., R41360, ABORTION AND FAMILY PLANNING-RELATED PROVISIONS IN U.S. FOREIGN ASSISTANCE LAW AND POLICY 3 (2017).

<sup>8</sup> *Id.* at 899.

<sup>9</sup> Ernst, Katzive & Smock, *supra* note 6, at 774.

<sup>10</sup> *Id.*

<sup>11</sup> Nina Besser Doorley, *U.S. House Urges Obama to Reinterpret Strict Abortion Rule*, INT'L WOMEN'S HEALTH COALITION (Aug. 12, 2015).

<sup>12</sup> *The Abortion Ban in U.S. Foreign Assistance: Obstructing Efforts to Save Women's Lives and Fulfill Women's Human Rights*, IPAS (2009), [www.ipas.org/~media/Files/Ipas%20Publications/HELMSE09.ashx](http://www.ipas.org/~media/Files/Ipas%20Publications/HELMSE09.ashx).

offer abortion services and still receive U.S. funding,<sup>13</sup> total repeal of the Helms Amendment seems unlikely in the current political climate.<sup>14</sup> Taxpayer funding for abortion services continues to be an untouchable political third-rail for U.S. politicians.<sup>15</sup>

Many criticisms of the Helms Amendment focus on the threat that the policy poses to female autonomy, freedom of speech, and foreign relations.<sup>16</sup> This Comment, however, explains that one of the emerging harms of the existing interpretation of the Helms Amendment is the threat that the policy poses to infectious disease prevention efforts in South and Latin America. Instead of an overall repeal of the Helms Amendment, this Comment proposes a unique approach—that Congress and executive agencies, like USAID, should interpret the text of the Helms Amendment narrowly, applying it to prevent abortion services only in true instances where abortion is used as a “method of family planning.”

To make this argument, this Comment relies on the legislative history of abortion legalization in the United States, exploring the years leading to the Supreme Court’s decision in *Roe v. Wade*. Historically, U.S. criminal law contained codified exceptions in instances that constituted a “justifiable abortion,” including rape, incest, health of the mother, and health of the child.<sup>17</sup> Similarly, many international laws have codified exceptions to criminal punishment for abortion where the child is in grave health or severely compromised.<sup>18</sup> An incremental approach to abortion liberalization occurred domestically and should be mirrored by U.S. foreign policy. Political change is difficult, and incrementalism in congressional and executive policy has historically created an important middle-ground allowing for bipartisan compromise on incredibly polarizing political issues.<sup>19</sup> The current interpretation and implementation of the Helms Amendment ignores these

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<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., Amanda Terkel & Laura Bassett, *Donald Trump Reinstates Ronald Reagan’s Abortion ‘Global Gag Rule’*, HUFFINGTON POST (Jan. 23, 2017), [http://www.huffingtonpost.com/entry/donald-trump-global-gag-rule\\_us\\_58822355e4b070d8cad1f774](http://www.huffingtonpost.com/entry/donald-trump-global-gag-rule_us_58822355e4b070d8cad1f774).

<sup>15</sup> Emily Crockett, *Why Both Democrats and Republicans Made Big Changes to Their Abortion Platforms This Year*, VOX (July 27, 2016), <http://www.vox.com/2016/7/27/12287350/democratic-republican-convention-abortion-planned-parenthood-platform>.

<sup>16</sup> Nina J. Crimm, *The Global Gag Rule: Undermining National Interests by Doing to Foreign Women and NGOs What Cannot Be Done at Home*, 40 CORNELL INT’L L.J. 587, 615–27 (2007).

<sup>17</sup> Donald J. Kenney, *Thalidomide—Catalyst to Abortion Reform*, 5 ARIZ. L. REV. 105, 110 (1964).

<sup>18</sup> Allegra A. Jones, “*The Mexico City Policy*” and Its Effects on HIV/AIDS Services in Sub-Saharan Africa, 24 B.C. THIRD WORLD L.J. 187, 191 (2004).

<sup>19</sup> SCOTT H. AINSWORTH & THAD E. HALL, ABORTION POLITICS IN CONGRESS: STRATEGIC INCREMENTALISM AND POLICY CHANGE 10–11 (2011).

strong arguments in favor of a narrow interpretation and continues to persist as a broad ban internationally.

Moreover, this Comment will highlight the intersection of public health policy and abortion in the United States and Europe by demonstrating that historically some of the strongest arguments in favor of abortion emerged during times of major public health crises. Epidemics like the outbreak of rubella and the unknown effects of the Thalidomide drug were a substantial catalyst for the liberalization of abortion laws in much of the Western world.<sup>20</sup> Similarly, this Comment discusses the parallels between past public health crises and the current threat posed by the Zika virus. Moreover, this Comment contends that because of a myriad of socio-economic factors plaguing the most common victims of the Zika virus in Latin America, U.S. foreign assistance is desperately needed. The Zika virus tends to affect women that are living at a lower socio-economic status in countries in South and Latin America that are deeply in need of foreign assistance from the United States.<sup>21</sup> Specifically, the Zika virus thrives in poorer areas because they are more likely to have open water sources which attract mosquitos, less access to bite-prevention mechanisms, poor sanitation, high population density, and less public health infrastructure to aid in detection and prevention education of the disease.<sup>22</sup>

Narrowly interpreting the “family planning” language in the Helms Amendment should be more consistent with the plain meaning and historical context behind the term “family planning.” A narrow interpretation of the Helms Amendment would align with other commonly proposed, and historically accepted, exceptions for when a woman is “justified” in receiving an abortion: rape, incest, and endangerment of the mother. Similarly, a narrower interpretation of the “family planning” language of the Helms Amendment would also allow for abortion in situations where a mother requires an abortion to avoid having a child with “grave symptoms” resulting from an infectious disease. A narrower reading of the “family planning” language in the Helms Amendment that restricts which abortions constitute those done as a method of family planning is particularly urgent in light of the Zika virus, which has the

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<sup>20</sup> See Kenney, *supra* note 17, at 105.

<sup>21</sup> Donald McNeil & Pam Belluck, *Abortion Pill Orders Rise in 7 Latin American Nations on Zika Alert*, N.Y. TIMES (June 22, 2016), <http://www.nytimes.com/2016/06/23/health/zika-virus-abortion-pill-latin-america.html>.

<sup>22</sup> Joshua Kruskal, *Zika Virus: How Poverty and Politics Will Determine Its Social Costs*, INT'L POL'Y DIG. (Feb. 19, 2016), <https://intpolicydigest.org/2016/02/19/zika-virus-poverty-politics-will-determine-social-costs/>; Clare Wenham, *Zika Isn't a Global Health Threat like Ebola. It Needs a Targeted Response*, GUARDIAN (Jan. 27, 2016), <https://www.theguardian.com/commentisfree/2016/jan/27/zika-virus-ebola-security-policies-poverty>.

potential to have long-lasting, tremendous public health policy implications in Latin America. To justify a narrower interpretation of the “family planning” language in the Helms Amendment, this Comment will look to other legislation with similar language, the legislative history of the Helms Amendment, and the important health policy ramifications of the current broad interpretation of the Helms Amendment.

In many countries that have been hit the hardest by the Zika virus, access to abortion is illegal except in rare circumstances.<sup>23</sup> Countries are starting to evaluate whether a domestic Zika exception may be in the interest of public policy. The domestic policy decisions of countries in South and Latin America, however, are beyond the scope of this Comment. Similarly, the spread of the Zika virus in Latin America has been attributed to the lack of contraceptive access of women in rural areas.<sup>24</sup> While it is likely true that increased contraceptive use and education would be beneficial to stymie the spread of the Zika virus, the issue of overall reproductive service access is also beyond the scope of this Comment.

Part I of this Comment explores the history of the Helms Amendment and U.S. foreign assistance specifically in the context of Latin America and the unfolding developments regarding the Zika virus. Part II then explains the consequences that have resulted from a broad interpretation of the family planning provision of the Helms Amendment and illustrates the problems that the Helms Amendment creates for women that are seeking access to abortion services as a result of a Zika virus infection. Finally, Part III analyzes the current statutory interpretation of the language of the Helms Amendment and argues that Congress should clarify that the language of the “family planning” provision is substantially narrower than it has been presently construed. Thus, through applying the principles of statutory interpretation, including a vast amount of history regarding abortion legalization and abortion laws with codified exceptions, this Comment recommends a narrow reading of the “family planning” language of the Helms Amendment.<sup>25</sup>

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<sup>23</sup> Aizenman, *supra* note 1.

<sup>24</sup> McNeil & Belluck, *supra* note 21.

<sup>25</sup> This Comment does not discuss the moral question of whether abortion is right or wrong or the scientific question of where life begins. The purpose of this Comment is not to argue against the normative justification for the Helms Amendment, but rather points to a particular instance where its application has deviated in a dangerously broad manner from its original intent.

## I. BACKGROUND

### A. *Roe v. Wade and the Helms Amendment*

To understand the significance of the Helms Amendment, it is first important to situate it within the historical context of the evolving debate about abortion rights in the 1970s. While some believe that the Supreme Court decision in *Roe v. Wade* caused a “clash of absolutes” regarding abortion, polarization regarding reproductive rights began long before the U.S. Supreme Court’s decision in 1973.<sup>26</sup> The decades leading up to *Roe* were already marked by extreme division in the debate over abortion rights, which were wrapped into broader discussions of morality, medicine, and family planning.<sup>27</sup> Although abortion already created large cultural fissures, the Supreme Court’s decision in *Roe* was perceived by the public and Congress as quite significant because it represented judicial intervention into the private arena of family planning and reproductive freedom.<sup>28</sup> The majority opinion in *Roe* solidified the lower court’s finding that the “freedom to choose in the matter of abortions has been accorded the status of a ‘fundamental’ right.”<sup>29</sup>

Although the recognition of abortion as a fundamental right was a victory for reproductive rights advocates, anti-abortion activists and politicians responded quickly. The rapid political mobilization can be, in part, attributed to Republican political strategy in the early 1970s.<sup>30</sup> Catholic voters, historically aligned with the Democratic party, became unified around the single-issue of abortion and were fighting laws in many states that attempted to decriminalize abortion.<sup>31</sup> Republican politicians in the early 1970s—including President Nixon—saw a unique opportunity to use abortion as a signal of social conservatism to create a clear wedge between Democrats and Republicans.<sup>32</sup>

Since challenging the right to abortions in court was an uphill battle, lawmakers resorted to small incremental pieces of legislation to chip away at the sweeping mandate of *Roe*.<sup>33</sup> In the time period immediately following *Roe*, Congress introduced legislation designed to restrict the right to abortion both at

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<sup>26</sup> MARY ZIEGLER, *AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE*, xi (2015).

<sup>27</sup> *Id.* at 1–3.

<sup>28</sup> *Id.* at 27.

<sup>29</sup> *Roe v. Wade*, 314 F. Supp. 1217, 1222 (N.D. Tex. 1970).

<sup>30</sup> Linda Greenhouse & Reva B. Siegel, *Before (and After) Roe v. Wade: New Questions About Backlash*, 120 *YALE L.J.* 2028, 2047 (2011).

<sup>31</sup> *Id.* at 2052.

<sup>32</sup> *Id.* at 2058.

<sup>33</sup> ZIEGLER, *supra* note 26, at 58.

home and abroad.<sup>34</sup> One of the main legislative focuses following *Roe* was the passage of a constitutional amendment designed to overturn the decision.<sup>35</sup> When the constitutional amendment failed to gain traction, legislators pivoted toward defunding abortion services at the federal level.<sup>36</sup>

One of these legislative attempts was the Helms Amendment to the Foreign Assistance Act of 1961. Congress initially passed the Foreign Assistance Act in 1961.<sup>37</sup> The Act separated military and non-military categories for foreign assistance, essentially restructuring the entirety of U.S. contributions toward foreign countries.<sup>38</sup> The Foreign Assistance Act also established the U.S. Agency for International Development (USAID), which administers economic assistance programs abroad.<sup>39</sup> At its creation, the goal of the Foreign Assistance Act and the USAID was to ensure that developing nations could continue on the path to sustainable economic growth by developing essential sectors within the target countries' economies.<sup>40</sup>

The same year that *Roe* was decided, Republican Senator Jesse Helms, a staunch opponent of abortion rights, introduced an amendment to the Foreign Assistance Act of 1961, now known primarily as the Helms Amendment.<sup>41</sup> The Amendment prohibits foreign assistance from paying for the “performance of abortion as a method of family planning” or to “motivate or coerce any person to practice abortions.”<sup>42</sup> The legislation severely curtailed the assistance that could be given to the population both by foreign governments and non-governmental organizations.

Helms's initial speech in support of the amendment was concerned with the USAID's assistance to foreign programs that were beginning to do research on the viability of chemical abortions “on a massive scale,” which would allow an abortion to be performed merely by taking a pill.<sup>43</sup> Helms contended that “abortion is an approved method of family planning in [US]AID programs at the present time,” suggesting that the USAID supported governments and non-

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<sup>34</sup> Sneha Barot, *Abortion Restrictions in U.S. Foreign Aid: The History and Harms of the Helms Amendment*, 16 GUTTMACHER POL'Y REV. (2013).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *A History of Foreign Assistance*, USAID, [http://pdf.usaid.gov/pdf\\_docs/Pnacp064.pdf](http://pdf.usaid.gov/pdf_docs/Pnacp064.pdf) (last visited Oct. 26, 2016).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Barot, *supra* note 34.

<sup>42</sup> Foreign Assistance Act of 1973, Pub. L. No. 93-189, § 114, 83 Stat. 714, 716 (1973).

<sup>43</sup> 119 CONG. REC. 25 (1973) (statement of Sen. Jesse Helms).

governmental organizations that allowed for abortion to be used as “post-conceptive fertility control” in place of traditional contraceptives.<sup>44</sup> The policy rationale forwarded by Helms was the proposition that abortion should never be used as a method of population control and that USAID should support contraceptives and abstinence education in the place of abortion funding.<sup>45</sup> Helms contended that large-scale mass abortions were being performed by USAID associated programs and that these programs were committing “crimes against humanity.”<sup>46</sup>

Liberal senators and the USAID feared that the Helms Amendment conflicted substantially with the Supreme Court’s decision in *Roe* and that the Amendment would actively dissuade countries from recognizing abortion as a fundamental right.<sup>47</sup> For example, in a congressional hearing on the Helms Amendment, Representative Clement Zablocki stated that he felt the Helms Amendment would be a serious infringement upon the sovereignty of foreign states because it is improper for the United States to unilaterally decide what family planning programs other countries pursue.<sup>48</sup> Administration officials within USAID expressed concerns that the Helms Amendment would be interpreted abroad as a form of U.S. imperialism dictating the cultural norms of other countries, a criticism that frequently plagued the actions of the USAID.<sup>49</sup> Critics also opposed the law on First Amendment grounds for violating the freedom of association and freedom of speech by restricting what non-governmental organizations could tell women seeking out their services.<sup>50</sup> Despite the criticism from *Roe* supporters, the Helms Amendment passed.<sup>51</sup>

Since its passage, the Helms Amendment has not laid dormant. Every Republican president has acted to expand the Helms Amendment, providing more restrictions on the use of U.S. funding for abortions, while every Democratic president subsequently rolled back the anti-abortion policies implemented by his predecessor.<sup>52</sup> For example, the Reagan administration expanded the Helms Amendment to prevent family planning funding for organizations that advocated for abortions and required foreign non-

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Barot, *supra* note 34.

<sup>48</sup> 119 CONG. REC. 25, *supra* note 43.

<sup>49</sup> Barot, *supra* note 34.

<sup>50</sup> Ernst, Katzive & Smock, *supra* note 6.

<sup>51</sup> Barot, *supra* note 34.

<sup>52</sup> See Yvette Aguilar, *Gagging on a Bad Rule: The Mexico City Policy and Its Effect on Women in Developing Countries*, 5 ST. MARY’S L. REV. ON RACE & SOC. JUST. 37, 42 (2002).

governmental organizations to sign contracts that they would not advocate for abortions prior to receiving USAID funds.<sup>53</sup> This policy, known as the Mexico City Policy, was repealed by Bill Clinton in 1993.<sup>54</sup> The pendulum swung back once more as President Bush reinstated the Mexico City policy after he was elected in 2001.<sup>55</sup> President Obama repealed many of the expansions of the Helms Amendment proffered by his predecessors, yet the core of the Helms Amendment still remained intact.<sup>56</sup> Under Obama, the Helms Amendment prevented USAID from providing foreign assistance that could be used for the purposes of supporting abortion as a means of family planning.<sup>57</sup> Much to the dismay of critics of the Global Gag Rule, who were hoping for an era of liberalism under President Obama, he avoided interpreting the language of the “family planning” provision to allow for exceptions to the Helms Amendment and instead consistently avoided the issue of whether he would attempt to clarify the law.<sup>58</sup>

On January 24, 2017, in one of his first acts as president, Donald Trump reinstated Reagan’s iteration of the Global Gag Rule.<sup>59</sup> However, President Trump’s version of the Global Gag Rule significantly expanded the policy beyond what Reagan had implemented.<sup>60</sup> While previous versions of the Global Gag Rule prevented U.S. family planning dollars from being used for abortion services, President Trump’s version of the Global Gag Rule applies to all U.S. global health funding.<sup>61</sup> According to Suzanne Ehlers, CEO of the global reproductive health organization Population Action International, President Trump’s policy is the Global Gag Rule “on steroids” because the policy will

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<sup>53</sup> *Id.* at 43.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 44.

<sup>56</sup> Daniel Nasaw, *Obama Reverses ‘Global Gag Rule’ on Family Planning Organizations*, GUARDIAN (Jan. 23, 2009), <https://www.theguardian.com/world/2009/jan/23/barack-obama-foreign-abortion-aid>.

<sup>57</sup> Cheryl Wetzstein, *Obama Urged to Re-Interpret Helms Amendment for Foreign Abortions*, WASH. TIMES (Aug. 12, 2015), <http://www.washingtontimes.com/news/2015/aug/12/obama-urged-to-re-interpret-helms-amendment-for-fo/>.

<sup>58</sup> *Id.*

<sup>59</sup> Terkel & Bassett, *supra* note 14.

<sup>60</sup> Karen McVeigh, *‘Global Gag Rule’ on Abortion Puts \$9bn in Health Aid at Risk, Activists Say*, GUARDIAN (Jan. 25, 2017), <https://www.theguardian.com/global-development/2017/jan/24/trump-abortion-gag-rule-health-aid>.

<sup>61</sup> Michelle Goldberg, *Trump Didn’t Just Reinstate the Global Gag Rule. He Massively Expanded It*, SLATE (Jan. 24, 2017), [http://www.slate.com/articles/news\\_and\\_politics/politics/2017/01/trump\\_s\\_global\\_gag\\_rule\\_is\\_even\\_worse\\_than\\_it\\_seemed.html](http://www.slate.com/articles/news_and_politics/politics/2017/01/trump_s_global_gag_rule_is_even_worse_than_it_seemed.html).

now affect \$9.5 billion of U.S. foreign aid funding instead of the \$600 million affected by previous policies.<sup>62</sup>

While foreign assistance funding for abortion services has become somewhat of a political football, federal domestic policies regarding abortion rights within the United States have been slightly less tumultuous. In the summer of 2016, the Supreme Court decided *Whole Women's Health v. Hellerstedt*,<sup>63</sup> a case challenging restrictive state laws on abortion clinics that effectually prevented women from utilizing reproductive services. In its decision, the Court upheld the constitutional right for a woman to access an abortion free from "undue burdens."<sup>64</sup> The Texas laws in question, referred to collectively as Targeted Restrictions on Abortion Providers (TRAP) laws, required that abortion clinics have hospital admitting privileges and meet surgical facility requirements, particularly stringent standards for small facilities.<sup>65</sup> These laws would result in a majority of the abortion clinics in Texas being forced to close their doors for failure to meet these exacting medical standards.<sup>66</sup> The Court held that both of the restrictions placed a "substantial obstacle" on women seeking an abortion and were not narrowly tailored to protect the health of the mother without infringing upon a woman's freedom of choice.<sup>67</sup> The majority opinion argued the restrictive Texas laws "erect a particularly high barrier for poor, rural, or disadvantaged women," recognizing that the decision to have an abortion is frequently predicated on a myriad of overlapping social and economic factors.<sup>68</sup>

The inconsistency between domestic and foreign policy regarding abortion is quite dramatic. While the right to have an abortion is relatively protected within the borders of the United States, U.S. foreign policy curtails that right for women around the globe.<sup>69</sup> With the Helms Amendment still in place and the

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<sup>62</sup> *Id.*

<sup>63</sup> *Whole Women's Health v. Hellerstedt* was touted as one of the most significant abortions cases since *Roe v. Wade* because many state laws were erected which substantially limited the right to have an abortion. See Hannah Levintova, *The Supreme Court Is About to Hear the Most Important Abortion Case in Decades*, MOTHER JONES (Mar. 1, 2016), <http://www.motherjones.com/politics/2016/03/supreme-court-about-hear-most-important-abortion-case-decades>; Eesha Pandit, *Understanding One of the Most Critical Supreme Court Cases of the Year: HB2 and the Fate of Abortion Access in Texas*, SALON (June 12, 2016), [http://www.salon.com/2016/06/12/understanding\\_one\\_of\\_the\\_most\\_critical\\_supreme\\_court\\_cases\\_of\\_the\\_year\\_hb2\\_and\\_the\\_fate\\_of\\_abortion\\_access\\_in\\_texas/](http://www.salon.com/2016/06/12/understanding_one_of_the_most_critical_supreme_court_cases_of_the_year_hb2_and_the_fate_of_abortion_access_in_texas/).

<sup>64</sup> See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310–20 (2016).

<sup>65</sup> *Id.* at 2296.

<sup>66</sup> *Id.* at 2312–13, 2316.

<sup>67</sup> *Id.* at 2300.

<sup>68</sup> *Id.* at 2302.

<sup>69</sup> Some are wondering whether the Global Gag Rule will be applied so broadly to even apply to corporations and foreign governments abroad. See Alexandra Zavis & Robyn Dixon, *Abortion Rates Went*

Global Gag Rule significantly expanded under the Trump administration,<sup>70</sup> U.S. foreign assistance to developing regions is stymied with regard to reproductive care. Some are already anticipating that the expansion of the Global Gag Rule and the continued implementation of the Helms Amendment may have dire implications for countries around the world, including South and Latin America.<sup>71</sup>

### *B. United States Foreign Assistance to Latin America*

The constant back and forth resulting from the repeal and subsequent reinstitutions of components of the Global Gag Rule has an effect on countries within South and Latin America that receive large amounts of foreign assistance from the United States.<sup>72</sup> The geographical proximity to the United States has long been the catalyst for sustained foreign assistance in South and Latin America because any economic or humanitarian crisis occurring there has the potential to have ripple effects within the United States if not properly contained.<sup>73</sup> As a result of the interdependence between Latin America and the United States, the United States has historically directed a large amount of foreign assistance to Latin American nations.<sup>74</sup> For example, in 2015 alone, President Obama requested \$1.3 billion of foreign assistance for the region.<sup>75</sup> Of the overall foreign assistance dollars that go toward Latin America, a significant amount of the annual assistance is directed toward Global Health Programs.<sup>76</sup>

In the early years of foreign assistance to Latin America, the majority of U.S. money was allocated to improvements in health and sanitation development.<sup>77</sup> In turn, improvements in these areas led to a sharp increase in population growth in Latin America in the mid-1960s as sanitation improvements decreased infant

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*Up in Some Countries the Last Time the Global Gag Rule Was In Effect*, L.A. TIMES (Jan. 28, 2017), <http://www.latimes.com/world/africa/la-fg-abortion-funding-ban-2017-story.html>.

<sup>70</sup> Goldberg, *supra* note 61.

<sup>71</sup> Jonathan Watts, 'Global Gag Rule' Could Have Dire Impact in Latin America, Activists Warn, GUARDIAN (Jan. 26, 2017), <https://www.theguardian.com/global-development/2017/jan/26/global-gag-rule-latin-america-abortion-contraception>.

<sup>72</sup> *Id.*

<sup>73</sup> PETER J. MEYER, CONG. RESEARCH SERV. R43577, U.S. FOREIGN ASSISTANCE TO LATIN AMERICA AND THE CARIBBEAN: RECENT TRENDS AND FY2015 APPROPRIATIONS (2014).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* At the time of this Comment, it remains to be seen whether President Trump will continue the same amount of foreign assistance funding to Latin American nations.

<sup>76</sup> *Id.*

<sup>77</sup> Katherine E. Bliss, *Health in Latin America and the Caribbean*, CTR. FOR STRATEGIC INT'L STUD. 18 (2009).

mortality and the safety of giving birth.<sup>78</sup> As a result, USAID began to focus attention on family planning and contraceptive care programs to ensure sustainable population growth without causing too much stress on public infrastructure.<sup>79</sup>

In the last decade, the United States has massively scaled back assistance for family planning programs in much of Latin America.<sup>80</sup> The USAID has argued that some Latin American countries have “graduated” from requiring U.S. foreign assistance dollars dedicated toward family planning services, implying that Latin America has reached a level of development where population control assistance is no longer necessary.<sup>81</sup> In reality, the USAID’s budget is quite limited and family planning has been forced to trade off with other priorities such as funding for contagious diseases and more traditional sector-specific development assistance.<sup>82</sup> The expansion of the Global Gag Rule under the Trump administration, however, means that the restrictions from the Helms Amendment apply to any foreign assistance for health programs in Latin America even if the programs are not explicitly earmarked as “family planning” programs.<sup>83</sup>

### C. Foreign Assistance Funding in the Face of the Zika Virus

The Zika virus, although new in popular culture, was first discovered in 1947 in Uganda.<sup>84</sup> The Zika virus is a mosquito-borne illness spread initially by the *Aedes* species of mosquitos.<sup>85</sup> Doctors have discovered, however, that the Zika virus can also be transmitted through blood transfusions, between sexual partners, and between a mother and her fetus during pregnancy.<sup>86</sup> Currently, there is no known treatment, cure, or vaccine for the Zika virus.<sup>87</sup>

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<sup>78</sup> *Id.*; Kimberly Cole, *A USAID Legacy in Latin America: Smaller Families and Better Health*, USAID (May 4, 2017), <https://www.usaid.gov/news-information/frontlines/may-june-2017>.

<sup>79</sup> Bliss, *supra* note 77.

<sup>80</sup> MEYER, *supra* note 73.

<sup>81</sup> JANE T. BERTRAND, USAID GRADUATION FROM FAMILY PLANNING ASSISTANCE: IMPLICATIONS FOR LATIN AMERICA, POPULATION INSTITUTE 7 (2011).

<sup>82</sup> J. Joseph Speidel et al., *Making the Case for U.S. International Family Planning Assistance*, BILL AND MELINDA GATES INSTITUTE FOR POPULATION AND REPRODUCTIVE HEALTH 5 (2009), [http://www.jhsph.edu/gatesinstitute/\\_pdf/policy\\_practice/Papers/MakingtheCase.pdf](http://www.jhsph.edu/gatesinstitute/_pdf/policy_practice/Papers/MakingtheCase.pdf).

<sup>83</sup> See Goldberg, *supra* note 61.

<sup>84</sup> Mary Kay Kindhauser et al., *Zika: The Origin and Spread of A Mosquito-Borne Virus*, WORLD HEALTH ORG. 675 (2016), <http://www.who.int/bulletin/volumes/94/9/16-171082.pdf>.

<sup>85</sup> *Zika: The Basics of the Virus and How to Protect Against It*, CTR. FOR DISEASE CONTROL, <http://www.cdc.gov/zika/pdfs/fs-zika-basics.pdf> (last visited Oct. 17, 2016).

<sup>86</sup> *Id.*

<sup>87</sup> Alexandra Sifferlin, *10 Zika Facts You Need to Know*, TIME (May 4, 2016), <http://time.com/4318624/zika-virus-and-birth-defects-what-you-need-to-know/>.

It was only during an outbreak of the disease in 2013 that scientists first discovered a connection between the Zika virus and Guillian-Barre syndrome, which produces symptoms resembling microcephaly, a severe birth defect causing an unusually small head.<sup>88</sup> While the symptoms of the Zika virus are incredibly mild for adults, ranging from no visible symptoms to a low-grade fever, rash, and joint pain, the Zika virus has much more pronounced symptoms if it is transmitted congenitally between a woman and her fetus.<sup>89</sup> Studies have found that the effects on the fetus can occur at any stage of pregnancy.<sup>90</sup> If a woman is infected with the Zika virus while pregnant or planning to be pregnant, the virus can cause microcephaly in the fetus.<sup>91</sup> Zika has also been attributed to the presence of other developmental disabilities in infants such as blindness, deafness, and seizures.<sup>92</sup> The outcomes can be grave, as there has been linkage between the Zika virus and fetal death.<sup>93</sup> The reports of the disease spread throughout 2015, and by early 2016 more than twenty countries reported members of the population infected with the disease.<sup>94</sup> Most of these countries were tropical in climate and had incredibly large mosquito populations, two main contributors to the transmission of the disease in the early stages of the epidemic.<sup>95</sup>

Like any communicable disease, the effects of the Zika virus transcend national borders.<sup>96</sup> The World Health Organization's Director-General Margaret Chan announced in 2016 that the International Health Regulations Emergency Committee determined that the Zika virus outbreak was a "Public Health Emergency of International Concern."<sup>97</sup> While there have been many reported cases of the Zika virus infecting women in the United States,<sup>98</sup> the majority of the known cases are emerging in South and Latin America.<sup>99</sup> Many developing countries in South and Latin America are not equipped with the necessary research and technology to actively prevent the Zika virus from spreading or to

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<sup>88</sup> Kindhauser et al., *supra* note 84.

<sup>89</sup> CENTER FOR DISEASE CONTROL, *supra* note 85.

<sup>90</sup> Karin Nielson-Saines et al., *Zika Virus Infection in Pregnant Women in Rio de Janeiro—Preliminary Report*, *NEW ENG. J. MED.* 2321, 2329–30 (2016).

<sup>91</sup> CLARE RIBANDO SEELKE, ET AL., CONG. RESEARCH SERV., R44545, ZIKA VIRUS IN LATIN AMERICA AND THE CARIBBEAN: U.S. POLICY CONSIDERATIONS, 4 n.14 (2016).

<sup>92</sup> Donald G. McNeil Jr. et. al, *Short Answers to Hard Questions About Zika Virus*, *N.Y. TIMES* (July 29, 2016), <http://www.nytimes.com/interactive/2016/health/what-is-zika-virus.html>.

<sup>93</sup> Nielson-Saines et al., *supra* note 90.

<sup>94</sup> Kindhauser et al., *supra* note 84.

<sup>95</sup> *See id.*

<sup>96</sup> *See* SEELKE, ET AL., *supra* note 91, at 1.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1.

<sup>99</sup> *Id.*

care for the women and children affected by the disease.<sup>100</sup> The countries in South and Latin America severely impacted by the Zika virus are looking to the United States for foreign assistance to help combat the spread of the virus and the health implications of an infection.<sup>101</sup>

In light of the Zika virus, the United States is mildly reinvigorating its funding efforts for health services in Latin America.<sup>102</sup> Funds allocated toward combating the Zika virus are on the rise in the region.<sup>103</sup> In 2016, President Obama made a request for an additional \$335 million dollars to be given to USAID to allocate toward Zika in Latin America.<sup>104</sup> Specifically, this funding would be used for control activities in Zika-affected countries and stimulating private sector research and development. Moreover, the funding would aid with maternal and child health support for infected mothers and family planning programs to decrease the number of women getting pregnant while infected.<sup>105</sup>

It remains unknown whether President Trump will request additional funding to combat the outbreak of the Zika virus in Latin America.<sup>106</sup> However, even in a scenario where President Trump increases foreign assistance, funding alone will not be enough to combat the true externalities of the spread of the disease in Latin America.<sup>107</sup> Many international reproductive rights advocates have argued that Zika virus assistance without assistance for abortion services would do an extreme disservice to the women in South and Latin America who are infected.<sup>108</sup> In many South and Latin American countries, abortion is still illegal.<sup>109</sup> Surprisingly, even in countries with the most stringent abortion laws,

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<sup>100</sup> *Id.* at 7–8.

<sup>101</sup> *See id.* at 14–15.

<sup>102</sup> *See* SEELKE, ET AL., *supra* note 91, at 18.

<sup>103</sup> SUSAN B. EPSTEIN & SARAH A. LISTER, CONG. RESEARCH SERV., R44460, ZIKA RESPONSE FUNDING REQUEST AND CONGRESSIONAL ACTION 1 (2016).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 20.

<sup>106</sup> President Trump's administration has remained silent on the overall level of funding that they would be willing to commit to the Zika virus since taking office. However, lead Trump cabinet appointees have suggested that they support de-funding government-funded research and disease efforts. *See* Julia Belluz, *Trump's Budget Director Pick: "Do We Really Need Government-Funded Research at All"*, VOX (Jan. 24, 2017), <http://www.vox.com/science-and-health/2016/12/21/14012552/trump-budget-director-research-science-mulvaney>; Rebecca Shabad, *Donald Trump: Congress Should Fund Efforts to Fight Zika*, CBS NEWS (Aug. 12, 2016), <http://www.cbsnews.com/news/donald-trump-congress-should-fund-efforts-to-fight-zika/>.

<sup>107</sup> Jasmine Garsd, *Should the US Reconsider Its Stand on Foreign Aid for Abortion Clinics?*, NPR (May 2, 2016), <http://www.npr.org/sections/goatsandsoda/2016/05/02/467247415/should-the-u-s-reconsider-its-stand-on-foreign-aid-for-abortion-clinics>.

<sup>108</sup> *Id.*

<sup>109</sup> Nathalie Baptiste, *Zika is a Reproductive Rights Issue*, FOREIGN POL'Y FOCUS (Feb. 19, 2016), <http://fpif.org/zika-reproductive-rights-issue/>.

leaders are debating whether to create domestic exceptions for the Zika virus to allow for women with the disease to be granted access to abortion services.<sup>110</sup>

In the minority of countries in South and Latin America where abortion is legal, assistance from the United States could help ensure that women receiving abortions have safe medical care during the procedure and have subsidized medical costs to reduce the economic burden of having an abortion.<sup>111</sup> In Colombia, for example, abortion is legal.<sup>112</sup> Marta Royo is the executive director for Profamilia, a group of family planning clinics in Colombia, and states that “USAID is especially targeted at some of the most vulnerable populations in the poorest areas.”<sup>113</sup> As a result of U.S. policies, groups like Profamilia will not be able to cover some of their target communities, leaving many poor and rural women without access to family planning services.<sup>114</sup>

## II. THE CASE FOR NARROWING THE “FAMILY PLANNING” LANGUAGE IN THE HELMS AMENDMENT

The “family planning” language of the Helms Amendment should be interpreted by administrative and agency officials more narrowly to only limit access to abortion services where abortion is being used as a substitute for limiting the amount or timing of children. The Helms Amendment has been interpreted in an astoundingly broad manner since its inception in 1973.<sup>115</sup> While the Helms Amendment explicitly prohibits U.S. funds to “pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions,” it has been implemented by the USAID as a ban on assistance for any abortion related procedures.<sup>116</sup>

First, this Section examines the harmful consequences of the broad interpretation of the Helms Amendment for women and public health across the globe. Second, this Section will examine the interpretation of “family planning” in similar U.S. laws to make the case that the Helms Amendment’s interpretation goes against the conventional plain meaning of the phrase “family planning.” Finally, this Section will demonstrate that historically in instances of major

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<sup>110</sup> *Id.*

<sup>111</sup> Ernst, Katzive & Smock, *supra* note 6.

<sup>112</sup> Emily Crockett, *How the Global Gag Rule Will Hurt Women and Families, Explained by 2 Experts on the Ground*, VOX, <http://www.vox.com/identities/2017/1/27/14397126/global-gag-rule-trump-increase-abortion-reduce-birth-control> (last updated Mar. 8, 2017).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> Ernst, Katzive & Smock, *supra* note 6.

<sup>116</sup> *Id.*

public health crises, similar to the Zika virus, the United States and other Western nations have liberalized their abortion laws. The public health implications of a generation of children born with grave illnesses have historically outweighed the traditional morality concerns that previously have shaped the debate over abortion legalization.

*A. The Consequences of a Broad Interpretation of the Helms Amendment*

First, and perhaps most importantly, a broad interpretation of the Helms Amendment creates a dangerous chilling effect in many Latin American countries that receive U.S. foreign assistance dollars.<sup>117</sup> The Helms Amendment can result in countries maintaining strict abortion laws to ensure that they are able to keep foreign assistance funding.<sup>118</sup> The effect is that some countries fear that changing their abortion laws could result in backlash from the United States.<sup>119</sup> As a result, the Helms Amendment has been criticized for being a form of “reproductive colonialism” that prevents countries from democratically electing to liberalize their abortion laws for fear of damaging the economic and diplomatic relationship with the United States.<sup>120</sup> Countries have no choice, then, but to give up any pursuits of liberalizing their abortion laws because the threat of losing U.S. foreign assistance for developing health care industries looms large.<sup>121</sup> Proponents of the Helms Amendment contend that allowing non-governmental organizations to perform abortions abroad would be an imposition of U.S. values abroad.<sup>122</sup> Instead, it seems that the imposition stems from unnecessary intervention in the organic political processes of another country by stifling advocacy and civic participation.<sup>123</sup>

For example, Brazil, a country that recently had calls from reproductive rights activists and members of the public to liberalize their abortion laws in response to Zika, has in some respects made its abortion laws even more stringent for fear of not complying with the United States foreign assistance

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<sup>117</sup> Sarah Wildman, *Trump's Global Abortion Gag Rule Goes Much Further Than Any Previous Administration*, VOX, <http://www.vox.com/policy-and-politics/2017/1/26/14384260/global-gag-rule-trump-abortion-womens-health-global-health-world> (last updated Jan. 28, 2017).

<sup>118</sup> Aguilar, *supra* note 52, at 51.

<sup>119</sup> *Id.* at 50–51.

<sup>120</sup> Jessica Mack, *Reproductive Colonialism: How U.S. Policy Hampers Global Abortion Rights*, ALTERNET (Apr. 3, 2013), <http://www.alternet.org/world/reproductive-colonialism-how-us-policy-hampers-global-abortion-rights>.

<sup>121</sup> *Id.*

<sup>122</sup> See Lola Okolosie, *The Return of the Global Gag Rule Stinks of Neocolonialism*, GUARDIAN (Jan. 27, 2017), <https://www.theguardian.com/commentisfree/2017/jan/27/global-gag-rule-neocolonialism-abortion-donald-trump-women-developing-world>.

<sup>123</sup> Crimm, *supra* note 16, at 631.

laws, which are given to foreign governments and non-governmental organizations without clear guidance for compliance.<sup>124</sup> Early criticisms of the Helms Amendment also demonstrate that this fear was present in parts of Africa during the initial outbreak of the HIV/AIDS epidemic on the continent.<sup>125</sup> The Helms Amendment and its progeny created a bureaucratic nightmare on the ground, as non-governmental organizations in countries that were plagued by the HIV/AIDS epidemic had to de-link their family planning programs with their HIV/AIDS programs in order to continue getting foreign assistance from the United States.<sup>126</sup>

Second, a broad interpretation of the Helms Amendment coerces women to pursue unsafe, and often underground, abortion procedures.<sup>127</sup> Restrictions on foreign assistance allocations do nothing to decrease the total amount of abortions that occur globally.<sup>128</sup> Rather, the lack of assistance toward abortion services has historically driven women toward seeking out more unsafe procedures.<sup>129</sup> The effect of the Helms Amendment is that non-governmental organizations are hesitant to provide any services to women seeking abortions for fear that they will lose essential U.S. funding for their organization.<sup>130</sup> The Helms Amendment also has the spillover effect of hampering domestic government efforts to prevent unsafe and illegal abortions because it deprives them of medical assistance and infrastructure that could make abortion procedures safer in their country.<sup>131</sup>

In the context of the Zika virus, women diagnosed with Zika have been increasingly seeking black-market abortion services to terminate their

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<sup>124</sup> Elizabeth Whitman, *Zika Emergency Funding Sparks Debate Over Abortion for Women in Latin America*, INT'L BUS. TIMES (Feb. 19, 2016), <http://www.ibtimes.com/zika-emergency-funding-sparks-debate-over-abortion-women-latin-america-2314989>.

<sup>125</sup> Berta Esperanza Hernandez-Truyol, *Family Planning and AIDS Policy in the International Community: Disposable People and Human Well-Being: Health, Money, and Power*, 13 U.C. DAVIS J. INT'L L. & POL'Y 35 (2006).

<sup>126</sup> Susan Cohen, *Global Gag Rule Revisited: HIV/AIDS Initiative Out, Family Planning Still In*, GUTTMACHER PUB. POL'Y 1 (2003).

<sup>127</sup> Kiersten Gillette-Pierce & Jamila Taylor, *What's at Stake for Women: Threat of the Global Gag Rule*, CTR. FOR AM. PROGRESS (Jan 23, 2017), <https://www.americanprogress.org/issues/women/reports/2017/01/23/297060/whats-at-stake-for-women-threat-of-the-global-gag-rule/>.

<sup>128</sup> Francoise Girard, *How U.S. Policy Continues to Threaten Women's Reproductive Rights Globally*, INT'L WOMEN'S HEALTH COALITION (May 19, 2016), <https://iwhc.org/2016/05/u-s-policy-continues-threaten-womens-reproductive-rights-globally-2/>.

<sup>129</sup> *Id.*

<sup>130</sup> Crimm, *supra* note 16, at 630.

<sup>131</sup> E. Dana Neacsu, *Imposing Sexual Restraint Abroad*, L. REV. MICHIGAN ST. U. DET. C. L. 885, 885 (2002).

pregnancies and have become desperate for relief.<sup>132</sup> For example, Women on the Web has reported a skyrocketing amount of requests for the abortion pill from women in Brazil, Venezuela, and Ecuador, claiming fears of a potential Zika infection.<sup>133</sup> While the abortion pill is mostly safe,<sup>134</sup> women in Latin America have been pursuing other riskier methods of performing an abortion on themselves.<sup>135</sup> For example, other non-traditional methods for an abortion include drinking herbal concoctions, injecting toxins, or inserting objects into the womb, which are procedures that can cause infection, infertility, and even death in women.<sup>136</sup>

Moreover, restricted access to abortion could create significant harm to the quality of life for women in Latin American countries.<sup>137</sup> In many instances, women, their partners, existing children, and extended families will carry the financial and care-taking burdens of adding a child with marked disabilities.<sup>138</sup> For example, a recent report by Debora Diniz, law professor at the University of Brasília, states that “seventy-two per cent of the babies born with the symptoms of Zika virus congenital syndrome in Brazil are born to women who live in the northeast states of Bahia, Paraíba, Pernambuco, and Rio Grande do Norte,” which tend to be “poor women from Northeast Brazil.”<sup>139</sup> Lower socio-economic status correlates with women who are most likely to have a child born with microcephaly because these women often do not have access to contraceptive care.<sup>140</sup> This means that poor women, who are the ones most likely to get pregnant while infected with the Zika virus in the first place, seek out the assistance of non-governmental organizations for natal care and bear the cost of raising a child with extreme disabilities.<sup>141</sup>

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<sup>132</sup> McNeil & Belluck, *supra* note 21.

<sup>133</sup> Sarah Boseley, *Abortion Demand Soars in Countries Hit by Zika Outbreak, Study Finds*, GUARDIAN (June 26, 2016), <https://www.theguardian.com/world/2016/jun/22/abortion-information-zika-virus-birth-defects-latin-america-study>.

<sup>134</sup> Death and serious complications are incredibly rare from ingesting mifepristone to induce a medical abortion; there are only about one out of 100,000 reported fatalities. However, that number may increase in countries where birth itself is not yet considered safe. See Mitchell Creinin, *Mifepristone-Misoprostol Medical Abortion Mortality*, 8 MEDSCAPE GEN. MED. 2 (2006).

<sup>135</sup> Clare Wilson, *Zika Virus Prompts Increase in Unsafe Abortions in Latin America*, NEW SCIENTIST (June 22, 2016), <https://www.newscientist.com/article/2094448-zika-virus-prompts-increase-in-unsafe-abortions-in-latin-america/>.

<sup>136</sup> *Id.*

<sup>137</sup> Alexandra Minna Stern, *Zika and Reproductive Justice*, 25 CAD. SAÚDE PÚBLICA 2 (2016).

<sup>138</sup> *Id.* at 2–3.

<sup>139</sup> Debora Diniz, *Zika Virus and Women*, 32 CAD. SAÚDE PÚBLICA 1 (2016).

<sup>140</sup> Wilson, *supra* note 135.

<sup>141</sup> Stern, *supra* note 137, at 3.

The socio-economic conditions of women affected by the Zika virus in areas of South and Latin America in many ways parallels the women affected by the TRAP laws at issue in *Whole Women's Health v. Hellerstedt*, illustrating a clear double-standard between United States domestic law and foreign policy. The Texas laws at issue in *Whole Women's Health* created legal barriers that restricted rural women's access to abortion clinics, which the Court held was a distinct "undue burden" on those particular women who may not have the economic resources to travel to get an abortion.<sup>142</sup> The holding in *Whole Women's Health* demonstrates that the Supreme Court has recognized the way that economics and abortion are intertwined domestically. For women living abroad who have been diagnosed with the Zika virus, the same economic concerns that apply are amplified by the cost of raising a child with a severe and likely grave disability.<sup>143</sup>

Finally, the Zika virus, much like the HIV/AIDS epidemic, has the potential to create a long-lasting public health crisis. Infants who contract the disease will impose a significant burden on existing public health infrastructure in countries in Latin America.<sup>144</sup> The Zika virus is still relatively new, and there is no way of knowing the effect that the disease will have on the development of the infants born with microcephaly as they grow up and the birth defects expose themselves further.<sup>145</sup> It is likely that microcephaly babies will need consistent and sustained medical support throughout their entire lives.<sup>146</sup>

By interpreting the Helms Amendment in a way that expands its prohibition on assistance to all abortions, the United States discourages countries from liberalizing their abortion laws, which in turn drives abortion underground. Moreover, the broad interpretation of the Helms Amendment prevents assistance in areas where need is incredibly high due to the burden that the Zika virus will place on public health infrastructure and the women who have to carry the children. The public policy implications alone suggest that there may be enough evidence that the Helms Amendment's current interpretation does not have enough benefits to justify its tremendous costs.

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<sup>142</sup> See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

<sup>143</sup> See Stern, *supra* note 137, at 3.

<sup>144</sup> Thais Medina Coeli Rochel de Camargo, *The Debate on Abortion and Zika: Lessons from the AIDS Epidemic*, 32 CAD. SAÚDE PÚBLICA 1, 2–3 (2016).

<sup>145</sup> *Id.* at 3.

<sup>146</sup> *Id.*

### B. *The Plain Meaning of the “Family Planning” Provision*

In addition to these compelling public policy reasons, a textual and historical analysis also supports the conclusion that the plain meaning of the “family planning” language in the Helms Amendment should be adopted by administrative agencies and Congress.

The current interpretation of the “family planning” language in the Helms Amendment contradicts common international and domestic definitions of “family planning.” For example, the World Health Organization defines “family planning” “as the ability of couples to anticipate and attain their desired number of children and the spacing and timing of their births.”<sup>147</sup> Here, the World Health Organization’s definition explicitly qualifies how a couple would attain the spacing and timing of their children’s birth through “use of contraceptive methods and the treatment of involuntary infertility.”<sup>148</sup>

The result of the current interpretation of the Helms Amendment is a near-total ban on assistance for abortions internationally.<sup>149</sup> On the ground, “abortion for family planning” has been interpreted to mean “all abortion and abortion related services.”<sup>150</sup> Most other federal laws and policies governing both domestic and international funding for abortion already include explicit exceptions in cases of rape, incest, or life endangerment.<sup>151</sup> When President George W. Bush reinstated the Global Gag Rule in 2001, the order explicitly stated that abortion is a “method of family planning when it is done for the purpose of spacing births,” and that an abortion performed in cases of rape, incest or life endangerment “is not a family planning act.”<sup>152</sup> Similarly, other federal programs interpret “abortion as a method of family planning” with a number of codified exceptions—including Medicaid, Indian Health service, Health Care for Women in Prisons, and the Federal Health Employees Benefits Program.<sup>153</sup> Ironically, USAID’s own website embraces the same definition of family planning as many of the other federal agencies.<sup>154</sup> The USAID website

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<sup>147</sup> A REVIEW OF THE HHS FAMILY PLANNING PROGRAM: MISSION, MANAGEMENT, AND MEASUREMENT OF RESULTS 30 (Adrienne Stith Butler & Ellen Wright Clayton eds., 2009).

<sup>148</sup> *Id.*

<sup>149</sup> POPULATION ACTION INTERNATIONAL, *No Exceptions: How the Helms Amendment Hurts Women and Endangers Lives* 1 (July 31, 2014).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> Barot, *supra* note 34.

<sup>154</sup> *Family Planning and Reproductive Health*, USAID, <https://www.usaid.gov/what-we-do/global-health/family-planning> (last updated Aug. 29, 2017).

states that “family planning refers to use of modern contraceptives or natural techniques to limit or space pregnancies.”<sup>155</sup>

It is clear that the definition of family planning embraced by numerous federal agencies describes family planning as the spacing and timing of having children. Abortion does not seem to fit into this definition unless abortion is used as a substitution for contraception or an *ex-post* form of contraception. The definition used by federal agencies demonstrates that “family planning” is thought to be the techniques an individual can use to limit or space out pregnancies. It follows that in order for abortion to be “a method of family planning,” the motivation for the abortion requires that a woman is intending to limit the number of children they have or space out when those child births occur.

The argument that unexpected events should be decoupled with “family planning” is not a new one. Activists who have argued for exceptions to the Helms Amendment for instances where a woman has been raped, conceived as a product of incest, or where the health of the mother is severely endangered have long argued that “abortion as a method of family planning” does not apply to unexpected circumstances like these because the women were not planning to have a family but were rather victims of unfortunate circumstances.<sup>156</sup> In these instances, women are not using abortion to substitute for contraceptive care. Instead, women are choosing abortion to remedy the harms of the pregnancy for the mother.

Abortion as a “method of family planning” should not apply to circumstances where the mother is receiving an abortion to avoid having a child born with the Zika virus. First, it is possible that a woman pregnant with a Zika-infected child could have been practicing other family planning techniques. For example, it is possible that a woman becomes pregnant with the Zika virus while also using contraception or other natural methods to limit or space out pregnancy. Therefore, the use of contraceptives would be the act of family planning; the abortion would be an entirely separate issue from determining whether to limit or space out the family. Second, it would be difficult to argue that anyone plans to infect their child with an infectious disease. The conundrum of the Zika virus is that any woman that is pregnant, whether the pregnancy is

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<sup>155</sup> *Id.*

<sup>156</sup> David Crary, *Abortion in the Cases of Rape: New Rifts in Old Debate*, WASH. TIMES (Apr. 12, 2014), <http://www.washingtontimes.com/news/2014/apr/12/abortion-in-cases-of-rape-new-rifts-in-old-debate/>.

planned or unplanned, can be infected with the virus, which in turn would severely hamper the health of their unborn child.

A narrow interpretation of the “family planning” provision may allow for a host of other exceptions to be formally granted, such as those for instances of rape, incest, and life of the mother. This proliferation of exceptions could cause some administrative difficulties for USAID because all of the mentioned exceptions require a case-by-case evaluation into the motivation for why a woman wants to terminate a pregnancy. This criticism has been levied against domestic “rape exception” laws, which allow for abortions in special circumstances where the mother has been raped, suggesting that there would have to be some enforcement mechanism that would evaluate the motivation of a woman.<sup>157</sup> These critics argue that the process would reduce a woman’s right to choose because evaluating the exceptions could turn into a bureaucratic struggle requiring a woman to explain herself to government officials before being granted access to reproductive care.<sup>158</sup>

Just because exceptions for instances of rape, incest, health of the mother, and grave illness of the child are hard to administer does not mean that they lack sound policy rationale. There is an administrative trade off, but this burden would not be on USAID; the burden would likely fall on local governments, non-governmental organizations, and medical service providers treating patients in South and Latin America. Moreover, these exceptions are in line with the plain meaning of the “family planning” language of the Helms Amendment, so even if the narrow interpretation presents administrative difficulties, it is more in line with the meaning of the language that Congress used when drafting the statute.

### *C. Historical Support for Liberalization of Abortion Laws in Light of Public Health Crises*

There is historical support for liberalizing abortion laws in the face of major public health crises. In order to understand the unique intersection of the Zika virus with access to family planning and abortion services, it is important to explore the history of some of the public health crises that occurred before the Supreme Court’s decision in *Roe v. Wade*. Public calls to liberalize abortion laws have often come in response to major public health epidemics likely to impact

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<sup>157</sup> Tara Culp-Ressler, *The Problem With Rape Exceptions*, ATLANTIC (Nov. 2, 2012), <https://www.theatlantic.com/sexes/archive/2012/11/the-problem-with-rape-exceptions/264470/>.

<sup>158</sup> *Id.*

the development of a fetus in the womb.<sup>159</sup> Two particular examples of the way that public health crises shaped the national dialogue regarding abortion are the effects of the Thalidomide drug and the spread of the rubella virus.<sup>160</sup> The cumulative effect of both of these public health crises is touted by some as the main catalyst for Western liberalization of abortion laws.<sup>161</sup>

The Thalidomide epidemic took place in the early 1960s. Thalidomide was a German anti-nausea drug prescribed to mothers plagued with morning sickness in the early stages of their pregnancy.<sup>162</sup> A side effect of the drug was that children born of a mother who had taken Thalidomide were highly likely to develop severe birth defects, including being born without limbs.<sup>163</sup> Abortion was still illegal in the United States and parts of Europe during the Thalidomide outbreak, but attitudes toward abortion began changing as a result of the epidemic.<sup>164</sup> Public opinion shifted toward the possibility that abortion was acceptable in circumstances where the child had a high likelihood of being born with grave defects, spurring conversation about reform of rigid abortion laws.<sup>165</sup>

Similarly, the rubella epidemic of the 1960s also changed the discussion about abortion. Rubella was a virus that had mild symptoms in adults similar to the common cold but could lead to “deafness, heart defects, mental disabilities, or even death in babies born to mothers who were infected.”<sup>166</sup> During the years before the decision in *Roe*, when abortion was still criminal, U.S. law contained an exception for “therapeutic abortions” for medical reasons.<sup>167</sup> Doctors began performing abortions for women with rubella under the umbrella of “therapeutic abortions” in order to avoid criminal penalties.<sup>168</sup> By 1968, four states had explicit rubella exceptions to abortion criminalization

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<sup>159</sup> Salim Al-Gailani, *From Rubella to Zika, Pregnancy, Disability, Abortion and the Spectre of an Epidemic*, GUARDIAN (Jan. 29, 2016), <https://www.theguardian.com/science/the-h-word/2016/jan/29/rubella-zika-pregnancy-disability-abortion-epidemic>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> George J. Anna & Sherman Elias, *Thalidomide and the Titanic: Reconstructing the Technology Tragedies of the Twentieth Century*, 89 AM. J. PUB. HEALTH 98, 99 (1999).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> Kenney, *supra* note 17, at 110.

<sup>166</sup> Becky Little, *Way Before Zika, Rubella Changed Minds on Abortion*, NAT'L GEOGRAPHIC (Feb. 5, 2016), <http://news.nationalgeographic.com/2016/02/160205-zika-virus-rubella-abortion-brazil-birth-control-womens-health-history/>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

laws, which allowed for abortions if the child would likely be born with a severe birth defect.<sup>169</sup>

Due to the severe effect that rubella had on unborn children, the societal discussion about abortion began to change from a moral to a medical decision.<sup>170</sup> The effect of the rubella epidemic opened up the conversation about abortion and made it less taboo to discuss the choice for a woman to have an abortion.<sup>171</sup> Arguments for allowing abortions in cases where the mother was infected with a disease like rubella pivoted the discussion away from women's liberation and reproductive freedom, which drew the most criticism from anti-abortion opponents, to whether a family could raise a healthy child.<sup>172</sup>

Currently, the relentless spread of the Zika virus is causing similar concerns in Latin America. In many places in Latin America, abortion is still illegal except in certain codified circumstances, such as rape, incest, or if the health of the mother is in danger.<sup>173</sup> Some countries, like Brazil, have exceptions for certain conditions of the child that can be determined during ultrasound testing.<sup>174</sup> While there are strong cultural aversions to abortion, largely due to the strong religious beliefs of the majority of Latin American countries, the tide may be turning in favor of liberalization in light of the epidemic.<sup>175</sup> For example, the United Nations has already called on countries in Latin America to rethink their strict laws on abortion in light of the outbreak of the Zika virus.<sup>176</sup> In Brazil, some legal activists are already petitioning the highest court to include an exception to existing law when a woman has been diagnosed with Zika.<sup>177</sup>

In the wake of the Thalidomide epidemic, a number of sources proposed scenarios for "justifiable abortions" where it could be proven that the children

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<sup>169</sup> Eliza Berman, *How German Measles Epidemic Stoked the Abortion Debate in 1965*, TIME (Feb. 2, 2015), <http://time.com/3692652/measles-abortion-1960s/>.

<sup>170</sup> Little, *supra* note 166.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> Stern, *supra* note 137, at 2.

<sup>174</sup> *Id.*

<sup>175</sup> Boseley, *supra* note 133.

<sup>176</sup> Jonathan Watts, *UN Tells Latin American Countries Hit by Zika to Allow Women Access to Abortion*, GUARDIAN (Feb. 5, 2016), <https://www.theguardian.com/world/2016/feb/05/zika-virus-epidemic-abortion-birth-control-access-latin-america-united-nations>.

<sup>177</sup> Devon Haynie, *Countries Where Abortion is Illegal Under Most Circumstances*, U.S. NEWS (Feb. 8, 2016), <http://www.usnews.com/news/best-countries/articles/2016-02-08/10-countries-where-abortion-is-illegal-under-most-circumstances>.

would have a “grave physical or mental defect.”<sup>178</sup> Similarly, the Model Penal Code from the 1960s suggests four exceptions to the illegality of abortion: (1) the pregnancy resulted from rape; (2) health of the mother; (3) grave defect to the child; and (4) the pregnancy resulted from incest.<sup>179</sup> These historical examples of justifiable abortion should be re-examined in light of the Zika virus. Many reproductive choice activists frequently cite rape, incest, or safety of the mother as potential exceptions to abortion restrictions because they can hardly be characterized as “family planning.” Grave illness to the child is another potential exception that can be carved out if the Helms Amendment had a narrower interpretation.

The history of abortion policy in the United States should serve as a normative guide for Congress and the executive organizations that administer the Helms Amendment. The history suggests that, despite the stark divisions in abortion policy, there were some areas—public health crises and illness of the child—that served as a reasonable middle ground between the pro-life and pro-choice political ideologies. Instead of merely restricting access to all abortion, history reveals that evaluating a woman’s particular motivation for receiving an abortion has been an effective tool for crafting law around abortion policy.<sup>180</sup>

#### CONCLUSION

As this Comment has shown, the Zika virus is a severe and urgent public health crisis. The virus spreads largely unnoticed through full-grown adults but has dramatic implications on the lives of children born with the gravely dangerous side effects of the disease. The current interpretation of the Helms Amendment as a *de facto* ban on all abortions, even ones not a product of family planning, prevents an effective response to the outbreak of the Zika virus in South and Latin America.

A narrower interpretation of the “family planning” language in the Helms Amendment would allow for abortion assistance in light of a public health epidemic where the health of the unborn child will be gravely and severely compromised by birth defects. Abortion as “a method of family planning,” as stated in the Helms Amendment, should not be interpreted as a ban on assistance for any instance where a woman is having an abortion. Instead, it is more accurate as a matter of plain meaning to interpret that “a method of family

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<sup>178</sup> Kenney, *supra* note 17.

<sup>179</sup> Harvey L. Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. CRIM. L. & CRIMINOLOGY 3, 4 (1969).

<sup>180</sup> *See id.*

planning” only means that U.S. foreign assistance cannot be given when a woman uses abortion as an *ex post* method of contraception. A narrower interpretation of the “family planning” provision that restricts abortion services to only when abortion is used as a primary method of family planning, analogous to *ex-post* contraception, is already applied in many other areas of U.S. domestic law. A narrower interpretation has historical support from analogous public health epidemics like the Thalidomide crisis and rubella outbreak of the 1960s.

Narrowing the scope of the “family planning” provision in the Helms Amendment is not without its opponents. Expanding abortion rights to allow women to make the choice to abort a child because of the child’s potential illness or disability has drawn strong criticism from disability rights scholars and advocates. Professor Rosemarie Garland-Thomson, a disability rights scholar, describes “ability-selective” abortions as a form of reproductive self-determination that has led to a long history of discrimination against disabled people by implying that their lives are more easily disposable as a result of the disability.<sup>181</sup> However, Garland-Thomson also contends that while women should have the right to an abortion, an “ability-selective abortion” should only be conducted as a result of an educated choice about the viability of the fetus and not solely because the child is disabled.<sup>182</sup>

Garland-Thomson’s approach is consistent with a narrow interpretation of the “family planning” language in the Helms Amendment proposed by this Comment. A narrow interpretation would, in effect, create an exception for women who have been diagnosed with the Zika virus but would not mandate that they get an abortion because of their diagnosis. Instead, women in South and Latin America would be given the option of an abortion but would be able to use their own wisdom about their own socio-economic condition, viability of their fetus, and overall health care needs when determining whether to abort the fetus.

With the Supreme Court’s recent decision in *Whole Women’s Health v. Hellerstedt*, which specifically recognized that access to abortion services becomes far more impactful for women in lower socio-economic communities, it is time for U.S. policy abroad to come into conformity with domestic policy. Restricting the way that U.S. funds can be used towards abortion is at odds with the most recent Supreme Court decisions in the United States regarding

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<sup>181</sup> Chloe Angyal, *Zika Virus Threat Puts Abortion Rights and Disability Rights on Collision Course*, HUFFINGTON POST (Feb. 4, 2016), [http://www.huffingtonpost.com/entry/zika-virus-us-abortion-disability\\_us\\_56b2601be4b04f9b57d83192](http://www.huffingtonpost.com/entry/zika-virus-us-abortion-disability_us_56b2601be4b04f9b57d83192).

<sup>182</sup> *Id.*

abortion.<sup>183</sup> While the Justices recognized that barriers to abortion access have a devastating ripple effect on women in poor communities,<sup>184</sup> our policies abroad continue to place the burden of bearing a child on women in lower socio-economic positions.<sup>185</sup> This effect is amplified for the Zika crisis because the areas that are most commonly harmed by the virus are those where the women fall below the poverty line.<sup>186</sup> Therefore, the United States should abandon the broad reading of the Helms Amendment and instead move toward a narrower interpretation of the “family planning” language, eliminating the double standard between domestic and foreign policy regarding abortion.

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<sup>183</sup> See *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

<sup>184</sup> *Id.*

<sup>185</sup> See Crockett, *supra* note 15; Stern, *supra* note 137.

<sup>186</sup> *Id.*

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