

STRENGTHENING THE OPPOSITION TO FEMALE GENITAL
 MUTILATION ACT OF 2020

SEPTEMBER 16, 2020.—Committed to the Committee of the Whole House on the
 State of the Union and ordered to be printed

Mr. NADLER, from the Committee on the Judiciary,
 submitted the following

R E P O R T

[To accompany H.R. 6100]

The Committee on the Judiciary, to whom was referred the bill
 (H.R. 6100) to amend title 18, United States Code, to clarify the
 criminalization of female genital mutilation, and for other pur-
 poses, having considered the same, reports favorably thereon with-
 out amendment and recommends that the bill do pass.

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Purpose and Summary

H.R. 6100, the “Strengthening the Opposition to Female Genital
 Mutilation Act of 2020,” or “STOP FGM Act of 2020,” would amend
 Section 116 of Title 18 to clarify the manner in which female gen-

ital mutilation (FGM)¹ is prohibited in the U.S. Code. Specifically, the bill explicitly defines what types of procedures constitute female genital mutilation. In doing so, H.R. 6100 would fortify the prohibition against FGM.

The STOP FGM Act of 2020 makes it a federal criminal act to knowingly (1) perform, attempt to perform, or conspire to perform female genital mutilation on a minor; (2) facilitate or consent to the female genital mutilation of a minor, while being a parent, guardian, or caretaker of the minor; or (3) transport a minor for the purpose of the performance of female genital mutilation on the minor.

H.R. 6100 would increase the statutory maximum term of imprisonment for a violation of the federal statute pertaining to FGM—18 U.S.C. § 116—from 5 years to 10 years. It would prohibit a defendant charged under section 116 from using as a defense the argument that they were compelled to commit the offense because of religion, custom, tradition, ritual, or standard practice.

The STOP FGM Act of 2020 would also require the Attorney General, in consultation with other federal agencies, to submit an annual report to Congress to include: (1) an estimate of the number of women and girls in the United States who are at risk of FGM or who have been subjected to it; (2) a description of the protections available and actions taken by federal, state, and local agencies to protect such women and girls; and (3) a description of the actions taken by federal agencies to educate and assist communities and key stakeholders about FGM.

Background and Need for the Legislation

Female genital mutilation involves the partial or total removal of external female genitalia or other injury to the female genital organs for non-medical reasons.² FGM can cause severe bleeding and problems urinating, and later cysts, infections, as well as complications in childbirth and an increased risk of newborn deaths.³ More than 200 million girls and women alive today have been cut in 30 countries in Africa, the Middle East, and Asia, where the practice of FGM is concentrated.⁴

According to the World Health Organization, FGM is recognized internationally as a violation of the human rights of girls and women, reflecting deeply-rooted inequality between the sexes, and constituting an extreme form of discrimination against women.⁵ It is nearly always carried out on minors.⁶

i. United States v. Nagarwala

H.R. 6100 was drafted to address the holding in *United States v. Nagarwala*,⁷ which dismissed the first federal prosecution under 18

¹Female Genital Mutilation, or FGM, is sometimes referred to as Female Genital Mutilation/Cutting (FGM/C).

²*Female Genital Mutilation*, World Health Organization) Feb. 3, 2020), <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

³*Id.*

⁴*Id.*

⁵*Id.*

⁶*Id.*

⁷350 F. Supp.3d 613 (E.D. Mich. 2018), *appeal dismissed by United States v. Nagarwala*, 2019 WL 7425389, Case No. 19–1051 (6th Cir. Sep. 13, 2019). The United States declined to defend the constitutionality of section 116(a) and voluntarily moved to dismiss its own appeal of the District Court's ruling. *See* Motion to Dismiss Voluntarily Pursuant FRAP 42(B) [Dkt. #40], *United States v. Nagarwala*, Case No. 19–1051 (6th Cir. May 31, 2019).

U.S.C. § 116(a) since the statute’s enactment in 1996. Dr. Jumana Nagarwala (Nagarwala), a Detroit-based emergency room physician, and other defendants were charged with performing FGM on minor girls out of a medical clinic in Livonia, Michigan.⁸ The United States presented evidence that some of the victims were residents of other states and, therefore, that they had traveled interstate to have the procedure performed in Michigan.⁹ Following Nagarwala’s arrest, a representative from DOJ commented that Nagarwala “is alleged to have performed horrifying acts of brutality on the most vulnerable victims,” and that the DOJ “is committed to stopping female genital mutilation in this country and will use the full power of the law to ensure that no girls suffer such physical and emotional abuse.”¹⁰

Before trial, the defendants moved to dismiss the third superseding indictment, arguing that Congress lacked the authority to enact section 116(a).¹¹ The district court agreed and held that section 116(a) is “unconstitutional”¹² because “Congress overstepped its bounds by legislating to prohibit FGM.”¹³ The court ruled that the statute did not satisfy (1) the Necessary and Proper Clause as a means of implementing the federal government’s treaty-making authority in relation to the International Covenant of Civil and Political Rights (ICCPR),¹⁴ or (2) the Commerce Clause as, in the court’s view, “[t]here is nothing commercial or economic about FGM” nor does “FGM itself ha[ve] any effect on interstate commerce” because no market exists for FGM beyond the mothers of the victims alleged in the indictment.¹⁵ On September 13, 2019, the United States Court of Appeals for the Sixth Circuit granted the government’s motion to voluntarily dismiss the appeal the government had previously filed and denied the U.S. House of Representatives’ motion to intervene and for oral argument on the motion.¹⁶ The United States’ withdrawal from the case left the district court’s holding in place.

ii. Congress’s Constitutional Authority

Despite the district court’s holding in *Nagarwala*, Congress maintains two bases upon which to enact a prohibition on FGM. Under Article I, Section 8 of the Constitution, Congress has the power “[t]o make all laws which shall be necessary and proper for carrying into Execution” treaties entered into by the United States.¹⁷ At the district court level, DOJ argued in *Nagarwala* that

⁸*Nagarwala*, 350 F.Supp.3d at 615.

⁹*See id.* at 616.

¹⁰*Detroit Emergency Room Doctor Arrested and Charged with Performing Female Genital Mutilation*, U.S. Attorney’s Office, E.D. Mich. (Apr. 13, 2017), <https://www.justice.gov/usao-edmi/pr/detroit-emergency-room-doctor-arrested-and-charged-performing-female-genital-mutilation>.

¹¹*Nagarwala*, 350 F.Supp.3d at 616.

¹²*Id.* at 630.

¹³*Id.* at 620.

¹⁴The ICCPR, a multilateral treaty, was ratified by the U.S. Senate in 1992. See https://www.ohchr.org/en/professional_interest/pages/ccpr.aspx; <https://www.congress.gov/treaty-document/95th-congress/20/resolution-text>. The International Covenant on Economic Social and Cultural Rights, the Universal Declaration of Human Rights, and the ICCPR and its two Optional Protocols, are collectively known as the International Bill of Rights. The court found that “there is no rational relationship” between the FGM statute and the Articles in the ICCPR. See *Nagarwala*, 350 F. Supp. 3d at 618.

¹⁵350 F. Supp. 3d at 630.

¹⁶ Order Granting Dismissal and Denying as Moot Motions to Intervene and for Oral Argument [Dkt. # 49], *United States v. Nagarwala*, Case No. 19–1051, (6th Cir. Sep. 13, 2019).

¹⁷U.S. Const., Art. I, § 8, cl. 18 & Art. II, § 2, cl. 2.

the FGM ban was an appropriate means of implementing Article 24 of the ICCPR.¹⁸ Article 24 states that, “Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”¹⁹ Despite precedent to the contrary, the district court observed that “the relationship between the FGM statute and Article 24 is tenuous.”²⁰ It further found that even assuming the treaty and the FGM statute are rationally related, federalism concerns deprive Congress of the power to enact this statute.²¹

The district court’s holding is untethered from Supreme Court precedent. In *Missouri v. Holland*,²² the Supreme Court rejected an argument that a treaty-implementing statute usurped a power reserved to the states. The *Holland* Court reasoned that because the underlying “treaty was valid, there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government.”²³

Congress also has the power under the Commerce Clause to prohibit FGM. Article I, Section 8, Clause 3 of the Constitution grants Congress the power “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”²⁴ To pass Constitutional muster, the government must show, under a rational-basis test, that FGM is either commercial or economic in nature and that it substantially affects interstate commerce directly or as part of an interstate market that has such an effect.²⁵ The district court held that FGM is a “purely local crime,” and is not commercial or economic in nature.²⁶ This interpretation ignores the interstate implications of the performance of an FGM procedure. Moreover, the Supreme Court has held in *Wickard v. Filburn*, that Congress has the power to regulate purely local activities that are part of an economic “class of activities” which have a substantial effect on interstate commerce.²⁷

The Commerce Clause also empowers Congress to regulate foreign commerce. In the United States, approximately 513,000 women and girls were at risk for FGM/C or its consequences.²⁸ And more than 3 million girls are estimated to be at risk for FGM annually, worldwide.²⁹ The international implications of FGM are profound. Indeed, even the U.S. government has acknowledged as much. For instance, in 2018, the U.S. Immigration and Customs Enforcement (ICE) initiated Operation Limelight USA. Operation Limelight is an outreach program designed by ICE’s Homeland Security Investigation’s Human Rights Violators and War Crimes Unit to educate travelers on the dangers and consequences of

¹⁸ See 350 F. Supp. 3d at 618.

¹⁹ See <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

²⁰ *Nagarwala*, 350 F. Supp.3d at 618.

²¹ *Id.*

²² 252 U.S. 416 (1920).

²³ *Holland*, 252 U.S. at 432.

²⁴ U.S. Const., Art. I, § 8, cl. 3.

²⁵ 350 F. Supp. at 621.

²⁶ *Id.* at 630.

²⁷ 317 U.S. 111, 124–25(1942).

²⁸ See Centers for Disease Control and Prevention, *Women and Girls at Risk of Female Genital Mutilation/Cutting in the United States*, Jan. 2016, www.prb.org/us-fgmc.

²⁹ See World Health Organization, *Female genital mutilation*, Jan. 31, 2018, <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation>.

FGM.³⁰ In addition, both the Human Rights and Special Prosecutions Section of the DOJ Criminal Division and the FBI work domestically to prosecute and investigate cases involving FGM.³¹

Hearings

On July 16, 2019, the Subcommittee on Crime, Terrorism, and Homeland Security held a hearing titled, “Women and Girls in the Criminal Justice System,” which helped develop the substance of the STOP FGM Act of 2020.

Committee Consideration

On March 11, 2020, the Committee met in open session and ordered the bill, H.R. 6100, favorably reported, by voice vote, a quorum being present.

Committee Votes

No record votes occurred during the Committee’s consideration of H.R. 6100.

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures and Congressional Budget Office Cost Estimate

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause (3)(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has requested but not received a cost estimate for this bill from the Director of Congressional Budget Office (CBO). The Committee has requested but not received from the Director of the CBO a statement as to whether this bill contains any new budget authority, spending authority, credit authority, or an increase or decrease in revenues or tax expenditures.

Duplication of Federal Programs

No provision of H.R. 6100 establishes or reauthorizes a program of the Federal government known to be duplicative of another federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section

³⁰See U.S. Immigration and Customs Enforcement, *ICE leads effort to prevent female genital mutilation at Newark Airport*, June 25, 2018, <https://www.ice.gov/news/releases/ice-leads-effort-prevent-female-genital-mutilation-newark-airport>.

³¹See U.S. Dept of Justice, Human Rights and Special Prosecutions Section, <https://www.justice.gov/criminal-hrsp>; see also *ICE, FBI Recognize International Day of Zero Tolerance for Female Genital Mutilation/Cutting*, FBI National Press Office, Feb. 6, 2018 (noting that the *Nagarwala* case was a joint investigation conducted by the FBI and HSI).

21 of Public Law 111–139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

Performance Goals and Objectives

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 6100 would strengthen and clarify the definition of FGM to ensure more effective prosecution by the federal government of those who engage in this heinous practice. Additionally, the bill would require a report to Congress regarding the prevalence and practice of FGM and the protections available and actions taken by Federal, State, and local agencies to protect women and girls from FGM.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 6100 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

Section-by-Section Analysis

The following discussion describes the bill as reported by the Committee.

Section 1. Short title. The title of this Act is the “Strengthening The Opposition to Female Genital Mutilation Act of 2020” or the “STOP FGM Act of 2020.”

Sec. 2. Congressional findings and purpose. Section 2 sets forth several Congressional findings pertaining to female genital mutilation, which go to assert the propriety of Congressional action prohibiting this practice. To begin, the findings underscore that FGM is recognized internationally as a human rights violation and a form of child abuse, gender discrimination, and violence against women and girls; that its eradication requires international cooperation and enforcement at the national level; and that the United States should demonstrate its commitment to the rights of women and girls by banning it. The findings further state that Congress has previously prohibited the practice in relation to minors as it is a practice that inflicts excruciating pain on its victims and causes grave physical and psychological harm. In addition, Congress has the power to prohibit female genital mutilation under the Necessary and Proper clause of the U.S. Constitution, to make all laws that are necessary and proper for carrying into execution treaties entered into by the United States, and under the Commerce Clause of the U.S. Constitution because an international market for the practice exists, persons who perform FGM in other countries typically earn a living from doing so, and those who perform this conduct often rely on a connection to interstate or foreign commerce. Finally, the bill finds that amending the statute to specify a link to interstate or foreign commerce would confirm that Congress has the affirmative power to prohibit the conduct involved in female genital mutilation.

Sec. 3. Amendments to current law on female genital mutilation. Section 3 would amend title 18, section 116 of the U.S. Code by setting forth three groups of persons who can be prosecuted under the statute: (1) anyone who knowingly performs, attempts to perform,

or conspires to perform, female genital mutilation on a minor (i.e., someone who has not attained the age of 18 years); (2) a parent, guardian, or caretaker of a minor who knowingly facilitates or consents to the female genital mutilation of the minor; and (3) anyone who knowingly transports a minor for the purpose of performance of female genital mutilation on the minor. Section 3 would also increase the statutory maximum for a violation of the statute, from 5 years to 10 years.

Section 3 would prohibit a defendant charged with this offense from using as a defense the argument that they were compelled to commit the offense because of religion, custom, tradition, ritual, or standard practice.

Section 3 would also explicitly set forth a series of circumstances under which the offense of female genital mutilation would be committed, including (among others) that the conduct occurred in the special maritime and territorial jurisdiction of the United States, or any territory or possession of the United States; the defendant or victim traveled in interstate or foreign commerce; the defendant used a means of interstate or foreign commerce in furtherance or in connection with the conduct; payment of any kind was made using any means, channel, facility, or instrumentality of interstate or foreign commerce; the defendant used a means of communication affecting interstate or foreign commerce; any instrument, item, substance, or other object that traveled in interstate or foreign commerce was used; and the conduct otherwise occurred in or affected interstate or foreign commerce .

Section 3 would also amend the existing statute to explicitly define what specific types of procedures constitute female genital mutilation. FGM is defined as any procedure performed for non-medical reasons that involves partial or total removal of, or other injury to, the external female genitalia, and includes: (1) a clitoridectomy or the partial or total removal of the clitoris or the prepuce or clitoral hood; (2) excision or the partial or total removal (with or without excision of the clitoris) of the labia minora or the labia majora, or both; (3) infibulation or the narrowing of the vaginal opening (with or without excision of the clitoris); or (4) other procedures that are harmful to the external female genitalia, including pricking, incising, scraping, or cauterizing the genital area.

Sec. 4. Report. Section 4 imposes an obligation upon the Attorney General, in consultation with the Secretary of Homeland Security, the Secretary of State, the Secretary of Health and Human Services, and the Secretary of Education, to submit an annual report to Congress including: (1) an estimate of the number of women and girls in the United States at risk of female genital mutilation or who have been subjected to it; (2) the protections available and actions, if any, taken by Federal, State, and local agencies to protect such women and girls; and (3) the actions taken by Federal agencies to educate and assist communities and key stakeholders about female genital mutilation.

Sec. 5. Sense of the Congress. Section 5 would express the sense of the Congress that, in *United States v. Nagarwala*, 350 F. Supp. 3d 613 (E.D. Mich. 2018), the U.S. District Court for the Eastern District of Michigan erred in invalidating the version of section 116 that this bill seeks to amend. Section 5 would express the sense of Congress that the commercial nature of female genital mutilation

is “self-evident,” meaning that the absence of particularized findings in the predecessor statute did not call into question Congress’s authority to legislate. The bill would further express that, in amending the statute, Congress would nevertheless not be ratifying the district court’s erroneous interpretation in *Nagarwala*.

Changes in Existing Law Made by the Bill, as Reported

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

PART I—CRIMES

* * * * *

CHAPTER 7—ASSAULT

* * * * *

§ 116. Female genital mutilation

[(a) Except as provided in subsection (b), whoever knowingly circumcises, excises, or infibulates the whole or any part of the labia majora or labia minora or clitoris of another person who has not attained the age of 18 years shall be fined under this title or imprisoned not more than 5 years, or both.]

(a) Except as provided in subsection (b), whoever, in any circumstance described in subsection (d), knowingly—

(1) performs, attempts to perform, or conspires to perform female genital mutilation on another person who has not attained the age of 18 years;

(2) being the parent, guardian, or caretaker of a person who has not attained the age of 18 years facilitates or consents to the female genital mutilation of such person; or

(3) transports a person who has not attained the age of 18 years for the purpose of the performance of female genital mutilation on such person,

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) A surgical operation is not a violation of this section if the operation is—

(1) necessary to the health of the person on whom it is performed, and is performed by a person licensed in the place of its performance as a medical practitioner; or

(2) performed on a person in labor or who has just given birth and is performed for medical purposes connected with that labor or birth by a person licensed in the place it is performed as a medical practitioner, midwife, or person in training to become such a practitioner or midwife.

[(c) In applying subsection (b)(1), no account shall be taken of the effect on the person on whom the operation is to be performed

of any belief on the part of that person, or any other person, that the operation is required as a matter of custom or ritual.

[(d) Whoever knowingly transports from the United States and its territories a person in foreign commerce for the purpose of conduct with regard to that person that would be a violation of subsection (a) if the conduct occurred within the United States, or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.]

(c) It shall not be a defense to a prosecution under this section that female genital mutilation is required as a matter of religion, custom, tradition, ritual, or standard practice.

(d) For the purposes of subsection (a), the circumstances described in this subsection are that—

(1) the defendant or victim traveled in interstate or foreign commerce, or traveled using a means, channel, facility, or instrumentality of interstate or foreign commerce, in furtherance of or in connection with the conduct described in subsection (a);

(2) the defendant used a means, channel, facility, or instrumentality of interstate or foreign commerce in furtherance of or in connection with the conduct described in subsection (a);

(3) any payment of any kind was made, directly or indirectly, in furtherance of or in connection with the conduct described in subsection (a) using any means, channel, facility, or instrumentality of interstate or foreign commerce or in or affecting interstate or foreign commerce;

(4) the defendant transmitted in interstate or foreign commerce any communication relating to or in furtherance of the conduct described in subsection (a) using any means, channel, facility, or instrumentality of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means or in manner, including by computer, mail, wire, or electromagnetic transmission;

(5) any instrument, item, substance, or other object that has traveled in interstate or foreign commerce was used to perform the conduct described in subsection (a);

(6) the conduct described in subsection (a) occurred within the special maritime and territorial jurisdiction of the United States, or any territory or possession of the United States; or

(7) the conduct described in subsection (a) otherwise occurred in or affected interstate or foreign commerce.

(e) For purposes of this section, the term “female genital mutilation” means any procedure performed for non-medical reasons that involves partial or total removal of, or other injury to, the external female genitalia, and includes—

(1) a clitoridectomy or the partial or total removal of the clitoris or the prepuce or clitoral hood;

(2) excision or the partial or total removal (with or without excision of the clitoris) of the labia minora or the labia majora, or both;

(3) infibulation or the narrowing of the vaginal opening (with or without excision of the clitoris); or

(4) other procedures that are harmful to the external female genitalia, including pricking, incising, scraping, or cauterizing the genital area.

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