Appeal No. 13-17247

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, MARICOPA COUNTY BRANCH and NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM,

Plaintiffs-Appellants,

v.

TOM HORNE, Attorney General of Arizona, in his official capacity, ARIZONA MEDICAL BOARD, and LISA WYNN, Executive Director of the Arizona Medical Board, in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court
from the District of Arizona
Case No. 2:13-cv-01079-PHX-DGC
The Honorable David G. Campbell, Judge

BRIEF OF *AMICUS CURIA* Congressman Trent Franks, Bill Montgomery, Maricopa County Attorney, Ariz. Rep. Steve Montenegro, Dr. Alveda King, Frederick Douglass Foundation, Susan B. Anthony List, Radiance Foundation, National Black Pro-Life Union, and University Faculty for Life IN SUPPORT OF DEFENDANTS-APPELLEES

Teresa S. Collett*
Counsel of Record
UNIVERSITY OF ST. THOMAS SCHOOL OF LAW
1000 LaSalle Ave., MSL 400
Minneapolis, MN 55403
651-271-2958
tscollett@stthomas.edu

Douglas L. Irish
J. Kenneth Mangum
Louis F. Comus III
MARICOPA COUNTY ATTORNEY'S OFFICE
222 N. Central Ave., Suite 1100
Phoenix, Arizona 85004

Additional counsel:

Steven H. Aden
Casey Mattox
ALLIANCE DEFENDING FREEDOM
801 G Street NW, Suite 509
Washington, DC 20001
(202) 393-8690
Facsimile (480) 347-3622
cmattox@alliancedefendingfreedom.org

*Institutional affiliation for identification purposes only

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STATEMENT OF INTEREST[*]

Congressman Trent Franks represents Arizona in the United States House of Representatives. He has been the chief sponsor of the Prenatal Nondiscrimination Act, a federal bill with bipartisan sponsorship and support that would prohibit sex- and race-selective abortions.

Representative Steve Montenegro represents Arizona House District 13 in the Arizona House of Representatives and was the chief sponsor of HB 2443, the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011.

William Montgomery is the County Attorney for Maricopa County, Arizona. Pursuant to Arizona law he is responsible to enforce the challenged Act and stands ready to do so.

Dr. Alveda King is a pro-life advocate and the niece of Dr. Martin Luther King, Jr. Following in her uncle's footsteps, she has been active

[*] All parties have consented to the filing of this brief, as required under Fed. R. App. Proc. 29(a). In accordance with Fed. R. App. Proc. 29(c)(5), the *Amici* affirms that neither the parties nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief.

in the African-American civil rights movement and sees the fight against abortion – including its impact on the African-American community – as a continuation of her uncle's work.

The Frederick Douglass Foundation is a multiethnic educational and public policy organization that works to empower African-American communities. Reflecting its namesake's focus on promoting the long-term interests of African-Americans and the equality of all persons, the Frederick Douglass Foundation is pro-life and particularly opposes the damage that abortion is doing to the African-American community.

The Susan B. Anthony List is dedicated to pursuing policies that will reduce and ultimately end abortion. Susan B. Anthony List works in the spirit and tradition of the original suffragettes including: Susan B. Anthony who called abortion "child murder;" Elizabeth Cady Stanton who said, "[w]hen we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit;" and Alice Paul, author of the original 1923 Equal Rights Amendment, who said "[a]bortion is the ultimate exploitation of women."

The Radiance Foundation is a nonprofit educational life-affirming organization led by Ryan Bomberger, a pro-life African-American whose mother was raped but she chose to allow her child to be adopted into a loving home. Through its "Too Many Aborted" campaign, the Radiance Foundation highlights the social injustice that abortion inflicts on the African-American community.

The National Black Pro-Life Union is a nonprofit organization committed to exposing the fact that abortion is the leading cause of death for African-Americans. The National Black Pro-Life Union coordinates with other pro-life African-American organizations to educate the community about the effect of abortion and to develop policies that will protect unborn lives of all races.

University Faculty for Life ("UFL") is an interdisciplinary association of North American scholars dedicated to promoting research, dialogue and publication by faculty who respect the value of human life. Its membership includes experts in medicine, sociology, law, psychology, and religion. UFL members believe abortion takes the lives of innocent human beings, harms women, and impedes creation of a just society in which women and men are recognized as equal.

SUMMARY OF THE ARGUMENT

Plaintiffs-Appellants ask this Court to resuscitate their claims of constitutional injury based on misrepresentation, exaggeration, and selective citation of the legislative record during the passage of Arizona's Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011. Notwithstanding their claim that their membership is stigmatized by the mere passage of the Act, Plaintiffs-Appellants delayed until May 13, 2013 prior to filing the challenge – more than two full years after its passage. The district court properly dismissed their complaint for lack of standing, and *Amici* ask this Court to affirm that ruling. *Amici* also suggest that this Court may uphold the dismissal because Plaintiffs-Appellants fundamentally failed to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

The Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act is facially neutral in prohibiting sex- and race-based abortions. *Every* unborn child in Arizona is protected from being aborted *because of* his or her sex or race. A.R.S. § 13-3603.02(A)(1). Prior to the performance of *every* abortion in the state, the person performing the abortion must complete an affidavit stating that the

abortion is not being performed "because of the child's sex or race and [that the person performing the abortion] has no knowledge that the child is being aborted because of the child's sex or race." A.R.S. § 36-2156. The affidavit is required without regard to the race or ethnicity of the woman seeking the abortion.

When viewed in its entirety the legislative record reveals troubling statistical disparities in the abortion rates of various racial and ethnic groups, as well as disturbing differences in the sex-ratio of births to women from various communities.[1] Review of the public record establishes that legislators were working proactively to combat emerging, yet well-documented and serious, public health concerns when passing the Act. There simply is no "stigmatic" injury here. The

[1] Video recordings of all committee hearings and legislative proceedings surrounding the passage of the Act are available on the Arizona State Legislature's website under archived meetings at http://azleg.granicus.com/ViewSearchResults.php?view_id=19&keywords=HB2443 (last visited May 14, 2014). Plaintiffs-Appellants and their *amici* produced and rely upon only a partial transcript attached as appendices to their complaint. Citation to time markers in the full video are provided to allow this Court to consider the full public record in evaluating the order of the district court. *See Coto Settlement v. Eisenberg,* 593 F.3d 1031, 1038 (9th Cir. 2010) (matters of public record and records referenced by complaint may be considered in evaluating a motion to dismiss).

judgment of the district court dismissing Plaintiffs'-Appellants' case should be affirmed.

ARGUMENT

I. LEGISLATORS ACTED TO DETER THE DEVELOPMENT OF A SERIOUS EMERGING PUBLIC HEALTH PROBLEM.

Review of the full legislative record surrounding the passage of the Susan B. Anthony and Frederick Douglas Prenatal Nondiscrimination Act establishes that the Arizona legislature carefully considered the global problem of sex- and race-selective abortion, the risk that it poses in Arizona, and the approaches of other legislatures in multiple countries and the United States Congress to address the problem. The record established the following legislative considerations and concerns:

- Legislators considered existing statutory bans on sex-based abortions in the United Kingdom, as well as China and India. Statement of Representative Montenegro, Hearing on H.B. 2443 before the H.R. Comm. on Health and Human Servs., 2011 Leg., 50th Sess., 1st Reg. Sess. (Ariz., Feb. 9, 2011) at time marker 1:01; and Statement of Sydney Hay, *id*. at time marker 1:30 (video *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8286).[2]

[2] These statements disprove Plaintiffs'-Appellants' claim that "[d]uring consideration of the Act no legislator discussed the abortion rates of

- Legislators understood that a maternal blood test can reveal the sex of a child as early as five (5) weeks after conception. "Since 2005 sexing through a blood test as early as five weeks after conception has been marketed directly to consumers in the U.S. raising the prospect of sex-selection becoming more widely practiced in the near future." Hearing on H.B. 2443 before the S. Comm. of the Whole #1, Floor Sess. Pt. 1 (Ariz., Mar. 21, 2011) (statement of Sen. Barto) at time marker 1:10 (video *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8908&meta_id=157419), *quoting* Douglas Almond & Lena Edlund, *Son Biased Sex Ratios in the 2000 United States Census*, Proceedings of the National Academy of Sciences of the United States of America, vol. 105, no. 15 (Apr. 2008) at 5681.[3]

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women of other races or practices in countries other than China and India." Appellants' Br. at 6. Plaintiffs'-Appellants' misstatement of the record is both surprising and troubling given that the statements of Representative Montenegro and Ms. Hay are reproduced in Exhibit C of their complaint. Compl., *NAACP v. Horne*, No. 2:13c01079 (D. Ariz., May 29, 2013), ECF No. 1, Ex. C. Representative Montenegro's statement reference to the British ban on sex-selective abortion appears at Compl. Ex. C, transcript ("trans.") p. 62, lines 7-11. Ms. Hay's statement regarding British policy appears at Compl. Ex. C, trans. p. 88 lines 6-12.

[3] This is directly contrary to Appellant NAACP's continuing false claim that the sex of an embryo or fetus cannot be determined at or before eleven weeks' gestation. *See* Compl. ¶ 51 (ER 028 ¶ 51) and Appellant' Br. at 6 ("the overwhelming majority of abortions among women of all races in Arizona (roughly 85%) occur before the sex of the embryo or fetus can even be determined by the earliest tests available (11 weeks or less)").

In fact, sex selection can occur before a pregnancy becomes established (pre-implantation), prenatally or following birth. Methods used for prenatally determining the sex of a fetus include a simple blood test,

chorionic villus sampling, amniocentesis, and ultrasound. A blood test can be performed from the fifth to seventh week of pregnancy based upon the drawing of a small sample of maternal blood in which fetal cells can be found. C.D. Matinhagen et al., *Accuracy of Fetal Gender Determination of Maternal Plasma at 5 and 6 weeks of Pregnancy*, 26 Prenat. Diagn. 1219-23 (2006) (accuracy according to gestational age was 92.6% (25 of 27 cases) at 5 weeks, and 95.6% (22 of 23 cases) at 6 weeks); Stephanie A. Devaney et al., *Noninvasive Fetal Sex Determination Using Cell-Free Fetal DNA: A Systematic Review and Meta-analysis*, 306 JAMA 627 (2011) (accurate up to 95% in the seventh week to 99% in the twentieth week of gestation); and Pam Belluck, *Test Can Tell Fetal Sex at 7 Weeks, Study Says*, N.Y. Times, Aug. 9, 2011 http://www.nytimes.com/2011/08/10/health/10birth.html?_r=0 (published in print on Aug. 10, 2011 in the New York edition at A1 under headline, *Is It a Boy or Girl? A Test at 7 Weeks*).

Plaintiffs'-Appellants' misstatement of fact may arise from the statements of Representative Heinz, then a member of the Arizona House of Representatives and physician specializing in internal medicine. Representative Heinz repeatedly misinformed legislators that the sex of a fetus was "impossible to determine" prior to twelve (12) weeks gestation. Hearing on H.B. 2443 before the H.R. Comm. of the Whole #2 (Ariz., Feb. 21, 2011) (statement of Rep. Heinz) A, at time 6:49-7:00 (video recording *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8484&meta_id=148865). He misstates the time at which sex can be determined in his testimony in subsequent hearings. Hearing on H.B. 2443 before the H.R. Rules Comm., (Ariz., Feb. 14, 2011) at time marker 43:30 (video available at http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8349) and Ariz. Sen. Healthcare and Medical Liability Reform, Mar. 2, 2011 at time marker 1:15 (video available at http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8648&meta_id=152579).

- Legislators considered the evidence provided during Congressional hearings to determine the nature and extent of the problem in the United States, and national efforts to address the practice of sex- and race-based abortions. Compl. Ex. B; Compl. Ex. C, trans. p. 87, line 14 through trans. p. 88, line 12; Hearing on H.B. 2443 before the S. Comm. on Healthcare and Medical Liability Reform (Ariz., Mar. 2, 2011) (statement of Sydney Hay) at time marker 1:05 (video *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8648&meta_id=152579).

- Legislators considered the 2009 Arizona Department of Health report, *Induced Terminations of Pregnancy*, which evidenced the dramatic disparate impact of abortion on black or African-American Arizonans. Hearing on H.B. 2443 before the H.R. Comm. on Health and Human Servs. (Ariz., Feb. 9, 2011) (statements of Rep. Montenegro) at time markers 1.04 and 1:28 (video *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8286). [4] In 2009 there were 10,045 abortions performed on Arizona residents, with 735 abortions or 7.3% of all abortions performed on black women. Yet African-Americans comprised only 3.9% of the state's population in 2009. Ariz. Dept. Health Servs., Arizona Health Status and Vital Statistics 2009 Report, *Induced Terminations of Pregnancy*.

- Legislators were aware that both Hispanic and black women were overrepresented among those obtaining abortions, while white women were underrepresented. African-Americans were more than twice as likely to seek an abortion as were their white counterparts. Hearing on H.B. 2443 before the H.R.

[4] This evidence alone provides more than the "shred of evidence" that Plaintiffs'-Appellants' claim to be absent from the legislative record. *Compare* Plaintiffs'-Appellants' Br. at 8.

Comm. on Health and Human Servs. (Ariz., Feb. 9, 2011) (statements of Rep. Montenegro) at time markers 1.04 and 1:28 (video *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8286); Compl. Ex. C, trans. p 11, lines 2-5; Compl. Ex. C. trans. p. 69, lines 10-13; Compl. Ex. C, trans. p. 74 line 16 through trans. p. 75, line 2.

- Legislators were informed that 76 % of Planned Parenthood facilities are placed in minority communities for the purpose of increasing revenue due to the high abortion rates of African Americans. Hearing on H.B. 2443 before the S. Comm. on Healthcare and Medical Liability Reform, (Ariz., Mar. 2, 2011) (statement of Beth Straley Hallgren quoting letter from Abby Johnson, former executive director of Planned Parenthood facility in Texas) at time marker 1:02 (video *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8648&meta_id=152579).

- Legislators were aware of reports of Arizona abortion providers agreeing to accept donations to reduce the number of minority births. Statement of Representative Montenegro, Ariz. H.R. Health and Human Services Comm., Feb. 9, 2011 at time marker 1:04, also available Compl. Ex. C, trans. p. 84, lines 18-22; Hearing on H.B. 2443 before the H.R. Comm. of the Whole #2, (Ariz., Feb. 21, 2011) (statement of Rep. Lesko quoting a letter from National Black Pro-Life Union dated Feb. 8, 2011) at time marker 13:08 (video *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8484&meta_id=148865).

This partial catalog of evidentiary considerations, many drawn from Plaintiffs'-Appellants' own exhibits, demonstrates the serious public health concerns that the legislature was addressing and totally negates

the hysterical claims that passage of the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act was motivated by animus, bias, perceptions of "yellow peril" (Asian-Americans Advancing Justice Br. at 3), or other discredited racial stereotypes.

II. ARIZONA HAS A STRONG STATE INTEREST IN PREVENTING SEX-BASED ABORTIONS.

The Supreme Court has repeatedly noted that our nation has a "long and unfortunate history of sex discrimination." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (*quoting Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion)). Some of this history was recounted by Justice Ginsburg in her majority opinion in *United States v. Virginia*, 518 U.S. 515 (1996).

> Through a century plus three decades and more of that history, women did not count among voters composing "We the People"; not until 1920 did women gain a constitutional right to the franchise. And for a half century thereafter, it remained the prevailing doctrine that government, both federal and state, could withhold from women opportunities accorded men so long as any "basis in reason" could be conceived for the discrimination.

Id. at 531.

Arizona legislators understood this history and recognized sex-selection abortion is often an expression of the same tragic and costly

devaluing of women. Arizona's interest in banning discriminatory abortion is powerful, not only because the state wants to protect the populations that may tend to obtain such abortions, but also because the prohibition is a means to challenge and eliminate private discrimination against women and against minorities. *See Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

A. Many Individual Practitioners Accept Sex-Selection Abortions, in Spite of Strong Opposition by Medical Associations.

A broad array of medical organizations have acknowledged the problem of sex-selection abortion and rejected it in principle. The American Congress of Obstetricians and Gynecologists has concluded that it is generally unethical for doctors to perform sex-selection abortions because of such abortions evidence the continuing devaluing of women.

> The committee accepts, as ethically permissible, the practice of sex selection to prevent sex-linked genetic disorders. The committee opposes meeting other requests for sex selection,

> such as the belief that offspring of a certain sex are inherently more valuable. The committee opposes meeting requests for sex selection for personal and family reasons, including family balancing, because of the concern *that such requests may ultimately support sexist practices*.

Amer. Cong. Obstet. Gyn Comm. on Ethics, Sex Selection, Comm. Opinion No. 360, Feb. 2007, reaffirmed 2011, at 4 (emphasis added), http://www.acog.org/Resources_And_Publications/Committee_Opinions/Committee_on_Ethics/Sex_Selection.

The American Society of Reproductive Medicine 2004 Ethics Committee Opinion on sex-selection notes that central to the controversy of sex-selection is the potential for "inherent gender discrimination", . . .the "risk of psychological harm to sex-selected off-spring (i.e., by placing on them expectations that are too high),". . . and "reinforcement of gender bias in society as a whole." Amer. Society for Reproductive Medicine, *Preconception Gender Selection for Nonmedical Reasons*, 82 (Suppl 1) Fertil. & Steril. S232-5 (September 2004).

The International Federation of Gynecology & Obstetrics ("FIGO") has noted that "approximately one female feticide occurs every minute" and has called for the elimination of this sex-selection abortion through

laws and professional policies at the national and international level. *See FIGO Reaffirms Commitment: International Day for the Elimination of Violence against Women* (Nov. 25, 2009), http://www.figo.org/news/figo-reaffirms-commitment-international-day-elimination-violence-against-women-25-november-2009 (last visited May 16, 2014).

Notwithstanding the condemnation of this practice by organized medicine, a number of practitioners support the right of a woman to obtain a sex-selection abortion. In a recent comparative study of the attitudes of primary care physicians and physicians providing sex-selection services, researchers found strong opposition to sex-selection practices among primary care physicians but robust support for the practice among doctors providing such services. While sex-selection service providers argued that sex selection was an aspect of women's reproductive freedom, primary care physicians questioned whether women could truly express free choice under family and community pressure, and noted that such practices contribute to sex-based stereotypes. Sunita Puri & Robert D. Nachtigall, *The Ethics of Sex Selection: a Comparison of the Attitudes and Experiences of Primary*

Care Physicians and Physician Providers of Clinical Sex Selection Services, 93 Fertil. & Steril. 2107 (May 2010).

In a 1994 world-wide survey of 2903 geneticists and genetic counselors, 29% of all those surveyed would perform prenatal diagnosis (PND) for a couple with four girls who want a boy and would abort a female fetus. An additional 20% would offer a referral. The percentage who would perform PND in the United States (34%) was exceeded only by Israel (68%), Cuba (62%), Peru (39%), and Mexico (38%). The survey also reveals that 62% of the Americans responding to the survey had had requests for sex selection. Dorothy C. Wertz & John C. Fletcher, *Ethical and Social Issues in Prenatal Sex Selection: A Survey of Geneticists in 37 Nations*, 46 Soc. Sci. & Med. 255, 258 (Jan.1998).

The willingness of some physicians to provide sex-selection in the face of uniform opposition by medical associations illustrates the necessity of the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act. By banning sex-selection abortions, Arizona is "protecting the integrity and ethics of the medical profession." *See Gonzales v. Carhart*, 550 U.S. 124, 157 (2008) (the state has a

legitimate role in regulating the medical profession and requiring that it maintain high ethical standards).[5]

B. Sex-Selection Abortions are Increasing Around the World.

Son preference is a global phenomenon with a long history. The natural sex ratio at birth ranges from 102 to 106 males per 100 females. However, sex selection through abortion and infanticide has resulted in birth ratios as high as 130 males per 100 females in some countries. This is notably the case in a number of South and East Asian countries, primarily India, China, Singapore, Taiwan, Hong Kong and South Korea, as well as in former Soviet Bloc countries in the Caucasus and Balkans such as Armenia, Azerbaijan, Georgia and Serbia. And, as political economist and demographer Nicholas Eberstadt has shown, sex ratio imbalance is spreading to other countries. "Recent vital statistics for places with complete or near-complete [vital records] registration, and census returns for other places, point to almost twenty additional countries with suspiciously high SRBs [sex ratios at birth]." Nicholas

[5] *See generally* Thomas Molony, *Roe, Casey, and Sex-Selection Abortion*, 71 Wash. & Lee L.Rev. 1089 (2014) *available at* http://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=4398&context=wlulr.

Eberstadt, *The Global War Against Baby Girls*, The New Atlantis, p. 3 at 13 (Fall 2011), *available at* http://www.thenewatlantis.com/publications/the-global-war-against-baby-girls (last visited May 18, 2014). He provides statistical evidence of sex-ratio imbalances in the Philippines, Brunei, Darussalam, Papua New Guinea, Bangladesh, Kyrgyzstan, Turkey, Lebanon, Libya, Cuba, Puerto Rico, El Salvador, Serbia, Montenegro, Austria, Italy, Portugal, and Spain. *Id.* News reports suggests that Canada should be added to the list. Lauren Vogel, *Sex Selection Abortion Migrates to Canada*, 184 Canadian Med. Ass'n. J. 163 (2012), *available at* http://www.cmaj.ca/content/184/3/E163.full.pdf (last visited May 16, 2014).[6]

In trying to explain the remarkable increase in sex-selection practices, agencies of the United Nations and affiliated international programs have noted that "a general trend towards declining family size, occasionally fostered by stringent policies restricting the number of

[6] Researchers have found similar evidence in England and Wales. Sylvie Dubuc & David Coleman, *An Increase in the Sex Ratio of Births to Indian Mothers in England and Wales: Evidence for Sex-Selection Abortion*, 33 Pop. & Dev. Rev. 383 (2007).

children people are allowed to have, is reinforcing a deeply rooted preference for male offspring." OHCHR, UNFPA, UNICEF, UN Women & WHO, *Preventing Gender-Based Sex Selection: An Interagency Statement* (2011) ("*UN Statement*") at 1, *available at* http://www.who.int/reproductivehealth/publications/gender_rights/9789241501460/en/ (last visited May 16, 2014). Echoing the concerns expressed by primary care physicians in the Puri study discussed above,[7] UN agencies observe that "women are often under immense family and society pressure to produce sons. Failure to do so may lead to consequences that include violence, rejection by the marital family or even death." *UN Statement* at 1. These concerns led the agencies to call for domestic and international legislation aimed at eliminating sex-selective practices. *Id*. at 9 ("legal action is an important and necessary element").

According to a 2009 global review of legislation on this issue at least three dozen countries have enacted laws or established policies on

[7] Sunita Puri & Robert D. Nachtigall, *The Ethics of Sex Selection: a Comparison of the Attitudes and Experiences of Primary Care Physicians and Physician Providers of Clinical Sex Selection Services*, 93 Fertil. & Steril. 2107 (May 2010).

sex selection. Marcy Darnovsky, *Countries with Laws or Policies on Sex Selection* (Apr. 2009), *available at* http://geneticsandsociety.org/downloads/200904_sex_selection_memo.pdf (last visited May 18, 2014). Of these, the vast majority prohibit sex selection for non-medical reasons, while five prohibit it for any reason. *Id*. The existence of these laws in half of all European nations as well as several countries in Asia and Oceania undercuts Plaintiffs'-Appellants' claim that Arizona's law is premised on animus toward Asian-American women, and strongly supports the district court's order of dismissal.

C. Arizona Responded to Mounting Evidence of Sex-Selective Abortion Practices in the United States.

Plaintiffs'-Appellants' entire case is built upon selective quotation of the legislative record identifying surprisingly high rates of abortion for various racial groups and disproportionate numbers of male offspring in certain birth cohorts. Yet almost all of these statements were made by legislators when describing and reflecting upon the growing body of evidence that sex- and race-based abortions are occurring in the United States.

Researchers from leading universities have identified evidence of sex selection within the United States. In 2008 Columbia University economists Douglas Almond and Lena Edlund published their study examining the sex ratio at birth among U.S.-born children of Chinese, Korean and Asian-Indian parents. They found that the first-born children of Asians showed normal sex ratios at birth, roughly 106 girls for every 100 boys. If the first child was a son, the sex ratio of second-born children was normal, but if the first child was a daughter the sex ratio of second-born children was 117 boys to 100 girls. This imbalance increased even more dramatically with the third birth if the family had no daughter, with a sex ratio at birth of 151 boys to 100 girls. Douglas Almond & Lena Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, 105 Proc. of the Nat'l Acad. of Sci. (PNAS) 5681, 5681-82 (April 15, 2008).

In 2009 Jason Abrevaya, a University of Texas economist, published *Are There Missing Girls in the United States? Evidence from Birth Data*, a study which analyzed birth data from California and showed that Asian-Indian mothers are significantly more likely both to have a terminated pregnancy and to give birth to a son when they have

previously only given birth to girls. Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data*, 1 Amer. Econ. J. 1 (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=824266 (last visited May 19, 2014). His study shows extensive statistical evidence "consistent with the occurrence of gender selection within the United States," most notably in third and fourth births to Chinese and Asian Indian mothers. *Id*. at 23-24.

A 2011 study conducted by University of San Francisco researchers found that cultural pressure to bear male offspring leads some immigrant Indian women in the United States to use readily available reproductive technology in an effort to select sons or abort female fetuses. Of the 51 women using ultrasound to identify the baby's sex, 24 of their fetuses were male and 27 were female. All male offspring were carried to term, but only three of the women carrying a female fetus continued their pregnancies to term. Sunita Puri et al., "*There is such a thing as too many daughters, but not too many sons": A qualitative study of son preference and fetal sex selection among Indian immigrants in the United States*, 72 J. Soc. Sci. & Med. 1169 (2011).

Representative Montenegro and other legislative supporters of the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act explicitly referenced the Almond and Abrevaya studies in hearings and floor debate of the Act. It is these studies and discussion of the public health problem they reveal that Plaintiffs-Appellants now rely upon as "evidence" of legislative animus and bias. Yet it simply cannot be the law that legislators are unable to discuss and address problems that have been identified as being uniquely present in certain racial and ethnic communities. To so hold would suggest that the Federal Prohibition of Female Genital Mutilation Act of 1996[8] passed in response to barbaric practices found in certain African and Middle Eastern countries is unconstitutional, or the Thirteenth through Fifteenth Amendments to the U.S. Constitution are constitutionally suspect because Congressional debates focused on the plight of black Americans and their unique experience of slavery in this country. The passage of Arizona's Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act was premised on important public

[8] Pub. L. 104 -140, 110 Stat 1327, 1996.

health considerations, and not animus. This Court should affirm the district court's order of dismissal below.

III. ARIZONA HAS A STRONG STATE INTEREST IN PREVENTING RACE-BASED ABORTIONS.

With the passage of the Fourteenth Amendment to the U.S. Constitution, our nation embraced the principle of equal protection of the law for all persons, regardless of race. It is beyond question that adherence to this principle is the duty of each state. *See generally Slaughterhouse Cases*, 83 U.S. 36 (1872). Arizona's prohibition of race-based abortions advances this principle by protecting all developing human beings from racially-motivated termination of their lives prior to birth.[9]

In 2009 there were 10,045 abortions performed on Arizona residents. Ariz. Dept. Health Servs., Arizona Health Status and Vital Statistics 2009 Report, *Induced Terminations of Pregnancy*. The number of abortions performed on African-American Arizonans was

[9] *See Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 686 F.3d 889, 898-99 (8th Cir. 2012) (upholding state requirement that women be informed that abortion "will terminate the life of a whole, separate, unique, living human being").

proportionally higher than the number of abortions performed on white Arizonans. African Americans comprised only 3.9% of the state's population, but obtained 735 abortions or 7.3% of all abortions performed. This is almost twice the percentage of abortions proportionate to the African-American percentage of the population. In contrast, whites comprised 60.3% of all Arizonans in 2009, but obtained 4759 or 54% of all abortions performed. This shows significantly fewer abortions in the white population based on the respective racial representation in the state. *See* Ariz. Dept. Health Servs., *Differences in Health Status among Race/Ethnic Groups: Arizona 2009,* at 1, *available at* http://www.azdhs.gov/plan/report/ahs/ahs2009/pdf/1d1.pdf.

If abortions had been performed on women proportionate to their representation in the population, there would have been only 392 abortions on African-Americans, saving the lives of 342 black children, while white women would have obtained 6057 or almost 1300 more abortions relative to their percentage of state population.

Few other racial or ethnic groups in Arizona experienced such wide divergence between the percent of abortions obtained relative to their percentage of population. Like black Arizonans, Hispanic and

Asian or Pacific Islander women obtained a high percentage of all abortions relative to their representation in the population, but to a much smaller degree. Hispanic women obtained 3,303 abortions or 33% of all abortions on Arizona residents, although Hispanics comprised 29.8% of all Arizonans.[10] Asians or Pacific Islanders comprised 2.6% of the population and obtained 3% or 390 abortions. American Indian or Alaska Natives, like whites, obtained significantly fewer abortions, relative to their percentage of population. They obtained 300 or 3% of all abortions, while they comprise 5.2% of the population. Population percentages taken from Ariz. Dept. Health Servs., *Differences in Health Status among Race/Ethnic Groups: Arizona 2009* at 1, *available at* http://www.azdhs.gov/plan/report/ahs/ahs2009/pdf/1d1.pdf.

These statistical disparity are both striking and probative of similar social and cultural pressures to those that primary care

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[10] Contrary to the allegations in paragraphs 29 and 32 of the Complaint, Representative Montenegro discussed the comparative rate of abortions among Hispanic and white women, as well as black Arizonans during the hearing before the House of Representatives Committee on Health and Human Services. Some of these statements appear in partial transcript filed as Exhibit C to the Complaint. Compl. Ex. C (May 29, 2013) at trans. p. 65, lines 12-15; trans. p. 74, line 16 through p. 75, line 2.

physicians expressed concern over when rejecting sex-selection abortions. *See* Sunita Puri & Robert D. Nachtigall, *The Ethics of Sex Selection: a Comparison of the Attitudes and Experiences of Primary Care Physicians and Physician Providers of Clinical Sex Selection Services*, 93 Fertil. & Steril. 2107 (May 2010).

Amica Black Women's Health Initiative provide a partial history of the racist practices directed at reducing the black population in America that occurred until the last third of the 20th Century.

> [I]n the first decade of the twentieth century, twelve states passed involuntary mandatory sterilization laws that, in practice, primarily targeted Black people. Government-funded doctors continued sterilizations even after states repealed involuntary sterilization laws. In the 1930s and 1940s, the North Carolina Eugenics Commission sterilized 8,000 "mentally deficient persons," including 5,000 Black persons. In 1954, all of the people sterilized at the South Carolina State Hospital were Black women. "[T]eaching hospitals performed unnecessary hysterectomies on poor Black women as practice for their medical residents. This sort of abuse was so widespread in the South that these operations came to be known as 'Mississippi appendectomies.'" The doctors who performed these surgeries later said that they thought sterilization would help stem population growth; one chief of surgery explained that "a girl with lots of kids, on welfare, and not intelligent enough to use birth control, is better off being sterilized." "[N]ot intelligent enough to use birth control . . . is often a code phrase for 'black' or poor."

Black Women's Health Initiative Br. at 10 (citations omitted).

Amica notes that "[f]rom the 1960s to the early 1970s, between 50,000 and 75,000 Black women were sterilized each year, often with federal funds." *Id., citing Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated on other grounds*, 565 F.2d 722 (D.C. Cir. 1977).

The facts of the *Relf* case vividly illustrate the abuses of the period. Two young sisters, Minnie Lee Relf, aged twelve and Mary Alice Relf, aged fourteen, were sterilized in Montgomery, Alabama through a federally-funded program.

> The episode began when two representatives of the federally financed county Community Action Agency called on Minnie Relf, an illiterate welfare mother of four, to instruct her that two of her daughters needed shots. Trusting the agency had the best interest of her children in mind, Mrs. Relf put her "X" on a paper without realizing that she was allowing a sterilization operation for her daughters, Minnie Lee and Mary Alice. The sterilization of the Relf sisters became national news when Joseph Levin, a lawyer, filed suit against the federal government.

Donald T. Critchlow, INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT IN MODERN AMERICA 144 (Oxford Press 1999).

Incidents like these confirmed some black leaders' worst fears about government-funded family planning programs. "Birth control is just a plot just as segregation was a plot to keep blacks down. It is a plot rather than a solution. Instead of working for us and giving us our rights—you reduce us in numbers and do not have to give us anything." *Id.* at 61 quoting communication between Elsie Jackson, PPFA field consultant to Alan F. Guttmacher, dated Apr. 4, 1966, subject file, Negro File, PPFA. Black leaders such as Julius Lester, Dick Gregory, Daniel H. Watts, and H. Rap Brown went so far as to describe abortion and family as "black genocide," calling upon blacks to eschew these practices to avoid "race suicide." Critchlow, INTENDED CONSEQUENCES at 142.

In legislative hearings on the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act, even a consultant for Arizona Planned Parenthood acknowledged that ""[n]o one will dispute that over the years that it appears that the African American population does decline," but she attributed the decline to "the choice now to choose how many children they want to have because of the services offered to them." Hearing on H.B. 2443 before the S. Comm. on

Healthcare and Medical Liability Reform, 2011 Leg., 50th Sess., 1st Reg. Sess. (Ariz., Mar. 2, 2011) (statement of Theresa Ulmer) at time marker 1:20 (video *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8648&meta_id=152579).

At that same hearing, Beth Straley Hallgren testified that 76 percent of Planned Parenthood facilities are located in minority neighborhoods in order to maximize clinic abortion revenues. Hearing on H.B. 2443 before the S. Comm. on Healthcare and Medical Liability Reform, (Ariz., Mar. 2, 2011) (statement of Beth Straley Hallgren quoting letter from Abby Johnson, former executive director of Planned Parenthood facility in Texas) at time marker 1:02 (video *available at* http://azleg.granicus.com/MediaPlayer.php?view_id=19&clip_id=8648&meta_id=152579).

The Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act prohibits four actions: the performance of a sex- or race-selection abortion, coercing a woman to obtain a sex- or race-selection abortion, and soliciting or accepting money to perform a sex- or race-selection abortion. A.R.S. § 13-3603.02(A)(1). The object of the

legislation is not the woman, who may be seeking a sex- or race-based abortion because she has been subjected to threats of violence (*see UN Statement* at 1) or more subtle cultural and social bigotry. The object of the Act is those who would perform and profit from these tragic and discriminatory abortions.

Plaintiffs-Appellants demand that Arizona's prohibition of race-based abortions be struck down because they perceive that the law targets and stigmatizes them. Compl. ¶¶ 3 and 6. Yet the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act is a law of general applicability and intended to address the dramatic disparities in the abortion rates of minority communities when compared with the rate of whites. "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals." *Shelley v. Kramer*, 344 U.S. 1, 22 (1948). The offense of the Plaintiffs-Appellants, whether feigned or real, provides no basis for enjoining Arizona's

attempt to preserve the lives of all children from those who would destroy them merely because of their race.[11]

[11] The tragic Pennsylvania story of the Gosnell clinic is instructive when considering the impact of racist beliefs on health care. In its report on Dr. Gosnell's practices the Grand Jury noted, "On those rare occasions when the patient was a white woman from the suburbs, Gosnell insisted that he be consulted at every step." Report of the Grand Jury at 7, In re Cnty. Investigating Grand Jury XXIII, Misc. NO. 0009901-2008, (Pa. Ct. Com. Pl. Jan. 14, 2011).

Later in the report, the testimony of a clinic employee is provided.

> Q: Okay. Was he present when you did that medication?
> A: No, no. And sometimes he asked them – but it was a race thing.
> Q: What do you mean?
> A: It was – he sometimes he used to – okay. Like if a girl – the black population was – African population was big here. So he didn't mind you medicating your African-American girls, your Indian girl, but if you had a white girl from the suburbs, oh, you better not medicate her. You better wait until he go in and talk to her first. And one day I said something to him and he was like, that's the way of the world. Huh? And he brushed it off and that was it.

Tina Baldwin also testified that white patients often did not have to wait in the same dirty rooms as black and Asian clients. Instead, Gosnell would escort them up the back steps to the only clean office – Dr. O'Neill's – and he would turn on the TV for them.

Id. at 62. This distinction in care may have contributed to the death and injury of many of his patients.

CONCLUSION

Arizona's Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act addresses well-documented and serious public health concerns. *Amici* ask this Court to affirm the district court's dismissal on the basis that the Plaintiffs-Appellants have failed to establish standing to attack the Act.

Respectfully submitted,

Teresa S. Collett*
Counsel of Record
UNIVERSITY OF ST. THOMAS SCHOOL OF LAW
1000 LaSalle Ave., MSL 400
Minneapolis, MN 55403
(651) 271-2958
tscollett@stthomas.edu

Douglas L. Irish
J. Kenneth Mangum
Louis F. Comus III
MARICOPA COUNTY ATTORNEY'S OFFICE
222 N. Central Ave., Suite 1100
Phoenix, Arizona 85004

Steven H. Aden
Casey Mattox
ALLIANCE DEFENDING FREEDOM
801 G Street NW, Suite 509
Washington, DC 20001
(202) 393-8690
Facsimile (480) 347-3622

cmattox@alliancedefendingfreedom.org

Attorneys for Amici Curiae

*Institutional affiliation for identification purposes only

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/EMF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/EMF system. I further certify that one of the participants in the case is not a registered CM/EMF user. I have sent the foregoing by UPS Overnight Delivery to the following non-CM/ECF participant:

Jennifer Allen Boucek
Office of the Attorney General
1275 W. Washington Street
Phoenix, AZ 85007

I further certify that on this day I shall mail seven copies of the foregoing to the Court, pursuant to Circuit Rule 31-1.

Dated: May 19, 2014

Teresa S. Collett

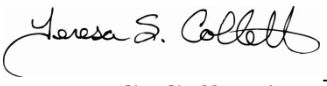
CERTIFICATE OF COMPLIANCE
WITH FEDERAL APPELLATE RULE 32

As required by Federal Appellate Rule 32(a)(7)(B), I declare that the Brief of *Amicus Curiae* Black Women's Health Imperative In Support of Plaintiffs-Appellants in Case No. 13-17247 contains 6265 words, excluding parts of the document that are exempted by Federal Appellate Rule 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Federal Appellate Rule 32(a)(5) and the type style requirements of Federal Appellate Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word, Century Schoolbook, 14-point font.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 19th day of May, 2014.



Teresa S. Collett*
Counsel of Record
UNIVERSITY OF ST. THOMAS
School of Law
1000 LaSalle Ave., MSL 400
Minneapolis, MN 55403
(651) 271-2958
tscollett@stthomas.edu

*Institutional affiliation for identification purposes only