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TESTIMONY OF NATALIE L. DECKER
LEGAL COUNSEL, ALLIANCE DEFENDING FREEDOM

Regarding House Bill 15-1162 Concerning the Prenatal Sex Nondiscrimination Act

March 16, 2015

My name is Natalie L. Decker. I am an attorney with Alliance Defending Freedom (ADF), an alliance-building, non-profit legal organization that promotes religious liberty, sanctity of life, and marriage and the family.

Most of my work with ADF is to advocate for the right of people to freely live out their faith. I am currently involved in a number of lawsuits in federal and state courts concerning religious liberties and the conscience rights of private business owners and religious organizations to be free from being required by the government to violate their sincerely held religious beliefs.

I am privileged to testify today on House Bill 15-1162 on behalf of Colorado Family Action (CFA). The mission of CFA is to strengthen families by applying founding principles and faith to policy and culture. CFA seeks to establish through citizen advocacy and enactment of Colorado law a safe, prosperous and wholesome climate for families. CFA's public policy decisions are based on the principles of life, marriage, parental authority, constitutional government, and religious liberty.

On behalf of CFA, I urge the adoption of this bill which would outlaw the performance of any abortion for the purposes of sex selection.

Frederick Douglass, born a slave, became perhaps the most influential black spokesman for emancipation and citizenship of the antebellum era through his newspaper, *The North Star*, which he founded in 1847. On the masthead of the newspaper was emblazoned the motto: "Right is of no sex; truth is of no color, God is the Father of us all - and all are brethren."

Greenwood Corporate Plaza, Building No. 3
7951 E. Maplewood Avenue, Suite 100
Greenwood Village, CO 80111
720-689-2410

Abortion is a national and, indeed, international tragedy for those who believe that life begins at conception, that each and every human being is created in the image of God and is intrinsically valuable from the moment life begins. More and more we are seeing evidence that abortion, though legal, is neither safe nor rare, to paraphrase the words of former President Clinton. Abortion is extremely difficult for the mother, for the father, and results in the death of the unborn child.[1] The world will be a better place when our laws do not recognize a right to an abortion at virtually any time after conception.

Gender is an immutable human genetic quality that exists at conception. Gender and a myriad of characteristics are woven together in the womb to create each unique member of the human species.[2] Federal and State laws prohibit discrimination on the basis of gender in housing, employment, education, lodging, commercial transactions and in a host of other contexts. Human life in the womb is recognized and protected by the laws of many, if not most, of the United States, against crimes of violence.[3]

The targeted victims of sex-selection abortions committed in the United States and worldwide are overwhelmingly female and disproportionately black. As early as twenty years ago, Harvard researcher Amartya Sen found that more than 100 million women were demographically missing from the world's population due to discriminatory practices and policies that in part reflected strong cultural preferences for male babies, so-

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[1] A physician treating a pregnant mother has two patients, the maternal patient and the fetal patient and owes duties of care to each. L.B. MCCULLOUGH AND F.A. CHERVENAK, ETHICS IN OBSTETRICS AND GYNECOLOGY (Oxford University Press New York 1994); D.W. Bianchi, *et al.*, FETOLOGY: DIAGNOSIS AND MANAGEMENT OF THE FETAL PATIENT (McGraw Hill New York 2000).

[2] Sex is determined even before fertilization. If a spermatozoon containing an x chromosome fertilizes an egg, the embryo will become a female; if the spermatozoon contains a y chromosome, the embryo will become a male. "Race" is a description of certain physical characteristics that are genetically determined; as discretely genetic characters, race and ethnicity do not exist, as the Human Genome Project explains:

> DNA studies do not indicate that separate classifiable subspecies (races) exist within modern humans. While different genes for physical traits such as skin and hair color can be identified between individuals, no consistent patterns of genes across the human genome exist to distinguish one race from another. There also is no genetic basis for divisions of human ethnicity.

The Human Genome Project, "Minorities, Race and Genomics," available at http://www.ornl.gov/sci/techresources/Human_Genome/elsi/minorities.shtml.

[3] *See, e.g.*, Unborn Victims of Violence Act of 2004 (PUBLIC LAW 108-212), at 18 U.S.C. 1841 and 22 U.S.C. § 919a (UNIFORM CODE OF MILITARY JUSTICE, Article 119a).

called "son preference."[4] *The Economist* reported on that phenomenon, and particularly on the role that sex-selection abortion plays in son preference.[5] "It is no exaggeration to call this gendercide," *The Economist* declared. "[T]he cumulative consequence for societies of such individual actions is catastrophic."[6]

In 2007, the U.S. delegation to the United Nations Commission on the Status of Women advocated for a resolution condemning sex-selection abortion.[7] The U.S. Congress has passed multiple resolutions condemning the People's Republic of China for its failure to end sex-selection abortion.[8] The American College of Obstetricians and Gynecologists has likewise condemned the practice, stating, "[T]he 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."[9]

The United States is far from immune to this problem. In 2008, researchers Douglas Almond and Lena Edlund of Columbia University analyzed year-2000 census data to document male-biased sex ratios among U.S.-born children of certain Asian and South Asian populations.[10] These researchers concluded that the demonstrated deviation from the norm in favor of sons was "evidence of sex selection, most likely at the prenatal

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[4] Amartya Sen, "More Than 100 Million Women Are Missing," *The New York Review of Books*, Vol. 37, Number 20, Dec. 20, 1990, available at http://www.nybooks.com/articles/3408.

[5] "Gendercide: The War on Baby Girls," *The Economist*, Mar. 4, 2010, available at http://www.economist.com/node/15606229.

[6] *Id.*

[7] *Draft Agreed Conclusions on the Elimination of All forms of Discrimination and Violence Against the Girl Child*, Commission on the Status of Women, 51st Session (26 February - 9 March 2007); *see also* Janice Shaw Crouse, "United States Resolution Shanghaied by China and India," Concerned Women for America, at http://www.cwfa.org/articledisplay.asp?id=12532&department=BLI&categoryid=reports&subcategoryid=bliun. Crouse noted that United Nations documents condemn the practice of sex-selection abortion; the United Nations Development Fund for Women (UNIFEM) argues that violence against women begins "quite literally" in the womb, and other U.N. documents label sex selection abortions as "violence." *Id.*

[8] H. R. CON. RES. 83, 109th Cong. (2005); H. R. RES. 794, 109th Cong. (2006).

[9] American College of Obstetricians and Gynecologists, Committee on Ethics, Committee Opinion 2007, available at http://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Ethics/co360.ashx?dmc=1&ts=20111203T1536377176.

[10] D. Almond and L. Edlund, "Son-biased Sex Ratios in the 2000 United States Census," Jan. 24, 2008, available at www.pnas.org/cgi/doi/10.1073/pnas.0800703105.

stage."[11] This "Son Preference" was true regardless of the absence in the United States of many factors used to rationalize son bias in other countries (*e.g.*, high dowry payments, patrilocal marriage patterns, and China's one-child policy) and was irrespective of the mother's citizenship status. Almond and Edlund further observed, "Since 2005, sexing through a blood test as early as 5 weeks after conception has been marketed directly to consumers in the United States, raising the prospect of sex selection [abortions] becoming more widely practiced in the near future."[12]

House Bill 15-1162 is a good start toward these goals. HB 15-1162 would make the commitment of an abortion for the purposes of sex selection a Class 2 Felony.

The bill could be made better by adding "race" to the list of prohibited abortions. In addition, the Committee should consider providing for civil remedies in the form of injunctive relief which may be sought by the Attorney General in a civil action and a private cause of action for the father of the baby lost to a sex selection abortion or, in the case of an unemancipated minor, the maternal grandparents of the preborn child.

It is our view that the U.S. Supreme Court's abortion jurisprudence supports this legislation should the Colorado General Assembly enact it. Although the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[13] recognized the essential holding of the Court in *Roe v. Wade*[14] that women possess the right to obtain an abortion without undue interference from the State before viability, *Casey* clarified that *Roe v. Wade* was based on the Supreme Court's perception that the State's interests were not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure at that pre-viability stage.[15] However, the Supreme Court has made it clear that States have a compelling interest in eliminating discrimination against women and minorities.[16] Moreover, the *Casey* Court

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11 *Id.*

12 For media reports on sex-selection advertisements, *see* Susan Sachs, "Clinics' Pitch to Indian Émigrés: It's a Boy," *The New York Times*, Aug. 15, 2001, available at http://www.geneticsandsociety.org/article.php?id=118; Rich Lowry, "The Backwardness of Abortion," *National Review*, Aug. 23, 2001, available at http://old.nationalreview.com/lowry/lowry082301.shtml.

13 505 U.S. 833 (1992).

14 410 U.S. 113 (1973).

15 *Casey*, 505 U.S. at 846.

16 *See, e.g., Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("There is a 'significant state interest in eradicating the effects of past racial discrimination.'"), quoting *Shaw v. Reno*, 509 U.S. 630, 656 (1993).

also affirmed the principle that "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the [unborn child]...."[17]

Nor can it be objected that no exception is made in House Bill 15-1162 for "medical necessity" or "health of the mother." By definition, abortions conducted because of the sex or race of the infant are elective procedures that do not implicate the health of the mother. Consequently, the absence of a "medical necessity" or "health exception" in this bill is not a constitutional defect.[18]

The balance of House Bill 15-1162's provisions are likewise well-grounded in constitutional law and jurisprudence. The term "based on the sex of the child" used by in proposed § 18-3.5.2-3(a) of House Bill 15-1162 is similar to the term "on the grounds of" employed by Title VI, 42 U.S.C. § 2000d. Both of these terms are functionally identical to the well-known and judicially developed term employed by Title VII of the 1964 Civil Rights Act, "because of... [*inter alia*] [sex]."[19]

House Bill 15-1162 is well-conceived and is drafted pursuant to sound constitutional authority. It also represents the State's best tradition in its commitment to civil rights and equality for all of its citizens.

On behalf of Colorado Family Action, I urge the adoption of this bill and the suggested amendments.

Thank you again for the privilege of appearing before this Committee on House Bill 15-1162.

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[17] 505 U.S. at 846.

[18] The Supreme Court approved the constitutionality of the federal Partial-Birth Abortion Ban Act despite the absence of a health exception in the statute, based upon the existence of a "documented medical disagreement" whether such an exception was required. *Gonzales v. Carhart*, 550 U.S. 124, 163-64 (2007). In this case, although some authorities contend there is a basis for prenatal sex screening for the purpose of genetic counseling for certain diseases that are gender-determinant, there can be no substantial disagreement that such cases do not implicate the health of the maternal patient.

[19] *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (affirming that the Title VII rubric "because of sex" is a workable standard that may be applied in a variety of contexts).

APPENDIX 1 – RACIAL SELECTION ABORTION

In the case of racial selection abortion, it is no exaggeration to say that the African-American population of the United States has been decimated by the widespread availability of abortion on demand in the last forty years, and particularly by the placement of abortion providers disproportionately in high minority population centers. Nationally, for all racial groups, the abortion ratio[20] was 231 abortions for every 1,000 live births.[21] Among women from the 37 health agencies that reported results for race in 2007, "Black women had higher abortion rates and ratios than white women and women of other races."[22] In the 25 reporting areas that reported cross-classified race and ethnicity data for 2007, "non-Hispanic black women had the highest abortion rates (32.1 abortions per 1,000 women aged 15 – 44 years) and ratios (480 abortions per 1,000 live births)."[23] Non-Hispanic black women accounted for nearly as many abortions proportionately as non-Hispanic white women (34.4% for black women vs. 37.1% for whites).[24] In 15 out of 38 reporting areas for which the data was available, the percentage of African-American abortions was approximately forty percent or higher, ranging up to 59.1% in one area (Georgia).[25]

Thus, although African-Americans account for only 13.6% of the U.S. population,[26] they account for over one-third of all abortions nationally, and in many states, that percentage is much higher. Commenting on this trend, the *Washington Post* observed that in the past 30 years, more mothers of color are opting to abort, and that in 2004, there were 10.5 abortions per 1,000 white women, compared with 50 per 1,000 black women. [27] In other words, African-American infants were more than five times

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20 "Abortion ratios reflect the relative number of pregnancies in a population that end in abortion compared with live birth; abortion ratios change both according to the proportion of pregnancies in a population that are unintended and the proportion of unintended pregnancies that are continued." Centers for Disease Control Abortion Incidence Report 2007, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6001a1.htm?s_cid=ss6001a1_w.

21 *Id.*; Table 1.

22 *Id.*; Table 12.

23 *Id.*; Table 14.

24 *Id.*

25 *Id.*; Table 12.

26 2000 census data lists persons responding to the category of "Race" with "Black or African-American alone or in combination" at 12.9% of the U.S. population; that percentage rose to 13.6% in the 2010 census. *See* http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf.

27 Rob Stein, "Study Finds Major Shift in Abortion Demographics," *Washington Post*, Sep. 23, 2008, available at

more likely to be aborted than white infants.[28] African-American women also obtained the highest percentage of later-term abortions,[29] in which risks to health are greater, and are more likely to suffer from preterm birth,[30] which has been linked to prior abortion of the maternal patient and is associated with a multiplicity of health problems for the neonatal patient.[31]

These are grave statistics for our African-American population. Tragically, the Centers for Disease Control and Prevention (CDC) observes that "abortion provides a proxy measure for the number of pregnancies that are unwanted."[32]

The CDC notes that multiple factors can influence the incidence of abortion, "including the availability of abortion providers."[33] In this regard, it is important to note that 80% of all non-primary-care abortion providers are located in major metro U.S. regions, where the population of African-American citizens is more highly concentrated.

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http://pqasb.pqarchiver.com/washingtonpost/access/1559584011.html?FMT=ABS&FMTS=ABS:FT&date=Sep+23%2C+2008&author=Rob+Stein+-Washington+Post+Staff+Writer&pub=The+Washington+Post&edition=&startpage=A.3&desc=Study+Finds+Major+Shift+in+Abortion+Demographics (by subscription).

[28] Notably, although the CDC attributes the comparatively high abortion rates and ratios among African-American women to higher unintended pregnancy rates and a higher percentage of unintended pregnancies ending in abortion, Hispanic women have a slightly higher percentage of pregnancies that are unintended but are no more likely than non-Hispanic white women to end unintended pregnancies by abortion. CDC, *supra*; Table 21.

[29] *Id.*; Table 22.

[30] African-American women have three times the risk of early preterm birth, defined as delivery at less than 32.0 weeks' gestation, and four times the risk of extremely preterm birth, defined as delivery at less than 28.0 weeks' gestation, compared with non-African-American women. G. Alexander et al., *U.S. Birth Weight/Gestational Age Specific Neonatal Mortality: 1995-1997 Rates for Whites, Hispanics and Blacks*, 111 PEDIATRICS 61 (2003), available at www.pediatrics.org/cgi/content/full/111/1/e61.

[31] B. Rooney & B.C. Calhoun, *Induced Abortion and Risk of Later Preterm Birth*, 8 J. AM. PHYS. SURG. 6 (2003).

[32] *Id.* "[I]ntended pregnancies are estimated to account for only 4% of all abortions." *Id.* These data do not appear to be changing over time. Three nationally representative surveys of women obtaining abortions in 1987, 1994-95 and 2001-02 have reported similar demographic results. *CDC, supra,* nn. 7-9.

[33] *Id.*; nn. 11, 68-70.

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Written Testimony of David A. Prentice, Ph.D.
Vice President and Research Director, Charlotte Lozier Institute
Adjunct Professor of Molecular Genetics, John Paul II Institute, Catholic University of America
Founding Member, Do No Harm: The Coalition of Americans for Research Ethics

Committee on Health and Provider Services, Indiana Senate
February 2015

To the Distinguished Chair and Honored Members of the Committee.

Thank you for the opportunity to testify IN SUPPORT of SB 334, the bill to prohibit prenatal discrimination, by prohibiting abortion based on sex selection or genetic abnormality.

I am a cell biologist, currently working for the Charlotte Lozier Institute in Washington, D.C. as Vice President and Research Director; I also serve as an adjunct professor at a Washington, D.C. university, and as an Advisory Board Member for the Midwest Stem Cell Therapy Center, a unique comprehensive stem cell center in Kansas. Previously I spent 10 years as Senior Fellow for Life Sciences at another policy think tank in Washington, D.C., and prior to that was almost 20 years a Professor of Life Sciences at Indiana State University, and Adjunct Professor of Medical and Molecular Genetics, Indiana University School of Medicine. Before that I was a faculty member in the Department of Obstetrics, Gynecology and Reproductive Sciences, University of Texas Medical School at Houston. I have done federally-funded laboratory research, lectured, and advised on these subjects extensively in the U.S. and internationally. I've taught embryology, developmental biology, molecular biology and biochemistry for over 30 years to medical and nursing students, as well as undergraduate and graduate students. I am testifying in my capacity as a scientist and on behalf of the Charlotte Lozier Institute.

This bill deals with preventing discrimination based on gender, or based on genetic differences, in pre-born human beings. While it might seem to some people that this is a straightforward and logical protection that is unnecessary, there is ample evidence for the need of such protection.

Gender in humans is determined by the sex chromosomes, X and Y, within an individual's cells. If you have two X chromosomes (XX) you are female, if XY you are male. This genetic composition is determined at the moment of conception. Likewise many genetic abnormalities, such as Down syndrome in which an individual has an additional chromosome 21, Edwards syndrome which is trisomy 18, Patau syndrome which is trisomy 13, and numerous other single-gene and multi-gene problems, are determined at conception when the sperm and egg fuse to form the zygote, the single-celled human organism.

Eugenics is the term given to attempts to control human heredity. In the past, such attempts have included efforts at selective breeding of "high-quality" individuals, selective sterilization of others to prevent offspring, and even infanticide. Today we see eugenic attempts at what some have termed "gendercide," usually selecting for boys and against girls, in the womb or as embryos in the laboratory.

There is ample evidence to show that gender selection abortion occurs in countries such as China and India.[1] One group even claims that the three deadliest words in the world are "It's a girl."[2] Globally it is estimated that there are between 160 million and 200 million missing girls, due to sex-selection abortion.[3]

But this problem also occurs in the United States, Canada, and other Western nations. The lack of proper records or mandated reports makes it more difficult to accumulate data on prenatal gender discrimination in North America, but there are now a number of studies that document similar sex-selection abortions taking place in the U.S. and in Canada,[4] and evidence as well for the U.K.[5] As in other countries, the targets are primarily girls, selected against for birth. Some opponents of prohibitions against sex-selection abortions state that such abortions are rare, but that is a tacit admission that some sex-selection abortions occur. Even one gender discrimination abortion is too many.

Chapman and Benn note that the availability of a "non-invasive prenatal test" (NIPT) that analyzes DNA fragments in the mother's blood plasma may lead to greater sex selection in developed countries.[6] Some centers now even advertise the ability to determine fetal gender as early as 10 weeks post-fertilization,[7] and published papers are pushing this determination even earlier, to 7 weeks[8] or even 6 weeks[9] after conception.

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[1] **Sachan D.** India's problem with girls, *BMJ* 347, f4149, August 2013; **Kay M.** Five Tamil Nadu doctors banned from practice for violating prenatal sex selection law of an unborn child, *BMJ* 346, f3788, June 2013; **Jha P *et al.***, Trends in selective abortions of girls in India: analysis of nationally representative birth histories from 1990 to 2005 and census data from 1991 to 2011, *Lancet* 377, 1921, 2011; **Xu WX *et al.***, China's excess males, sex-selective abortion, and one child policy: analysis of data from 2005 national intercensus survey, *British Medical Journal* 338, b1211, 2009; **Hesketh T *et al.***, The consequences of son preference and sex-selective abortion in China and other Asian countries, CMAJ 183, 1374, 2011

[2] It's a girl, http://www.itsagirlmovie.com/

[3] **Mara Hvistendahl**, *Unnatural Selection: Choosing Boys over Girls, and the Consequences of a World Full of Men*, Public Affairs Publishing, p. 5-6 (2011). Hvistendahl writes that an estimated 163 million females were demographically 'missing' from Asia alone, as early as 2005; ***United Nations Fact Sheet**: International Women's Day 2007, available at* http://www.un.org/events/women/iwd/2007/factsfigures.shtml.]

[4] **Kale R**, "It's a girl!"--could be a death sentence, *CMAJ* 184, 387, 2012; **Almond D and Edlund L**, Son-biased sex ratios in the 2000 United States Census, *Proceedings of the National Academy of Sciences USA*, 105, 5681, 2008; **Abrevaya J**, Are there missing girls in the United States? Evidence from birth data, *American Economic Journal: Applied Economics* 1, 1, 2009; **Puri S and Nachtigall R**, The ethics of sex selection: a comparison of the attitudes and experiences of primary care physicians and physician providers of clinical sex selection services, *Fertility and Sterility* 93, 2107, 2010; **Puri P *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, *Social Science and Medicine* 72, 1169, 2011; **Egan JFX *et al.***, Distortions of sex ratios at birth in the United States; evidence for prenatal gender selection, *Prenatal Diagnosis* 31, 560, 2011.

[5] **Adamou A *et al.*** Missing women in the United Kingdom, *IZA Journal of Migration* 2, 10, 2013

[6] **Chapman AR and Benn PA.** Noninvasive Prenatal Testing for Early Sex Identification: A Few Benefits and Many Concerns, *Perspectives in Biology and Medicine* 56, 530-547, 2013

[7] See, *e.g.*, Prenatal Genetics Center, accessed at: http://www.prenatalgeneticscenter.com/

[8] **Devaney SA *et al.*** Noninvasive Fetal Sex Determination Using Cell-Free Fetal DNA, *JAMA* 306, 627, August 2011

[9] **Fernández-Martínez FJ *et al.*** Noninvasive fetal sex determination in maternal plasma: a prospective feasibility study, *Genet Méd* 14, 101, 2012

Genetic discrimination abortions, in terms of those against genetic abnormality, show well-documented evidence involving discrimination against babies diagnosed *in utero* with Down syndrome. Studies show that such pre-born children are aborted at an extremely high rate. Documentation from other countries, who keep better records than the United States, tells a chilling tale.

In France, which keeps excellent records on prenatal screening as a matter of public policy, Bradford cites a 96% rate of abortion for those diagnosed in the womb with Down's.[10] In the U.K., an earlier study found a 92% abortion rate for children diagnosed in the womb with Down syndrome,[11] while a 2012 study found that 100% of those babies diagnosed in the womb with Down syndrome were aborted.[12]

In the U.S., a 1999 study found almost 87% of those diagnosed with Down syndrome in the womb were aborted.[13] A 2012 review of the literature on this topic, looking only at U.S. data, found a weighted mean from 61% up to 93% of those diagnosed who were aborted.[14]

Similar rates of selection against life are seen for babies diagnosed in the womb with other genetic conditions, or even physical abnormalities. Again, this is simply a modern version of eugenic selection.

Sometimes regarding these prenatal diagnoses, we hear the term "incompatible with life." Nora Sullivan points out that this label "portrays as a medical diagnosis what is really a judgment call about a profoundly disabled child's quality of life. The term is not only offensive to parents who object to the implication that their children's lives hold less value due to their potential brevity but also has serious implications as to how families perceive these disabilities and their decision-making process."[15] She tells the story of Tracy Harkin, a spokeswoman for the group Every Life Counts, and the mother of 8-year-old Kathleen Rose who was born with Trisomy 13. Harkin points out that the term is "medically meaningless, incorrect, and enormously hurtful." Indeed, a study in *Critical Care Medicine* noted that what doctors tell parents about their child's prognosis is often influenced by the doctor's own attitude toward neurological impairment.[16]

Moreover, while older texts say that around 90% of children born with Trisomy 18 don't live as long as a year, this is simply outdated information. For example, Bella Santorum, daughter of former Sen. Rick

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[10] **Bradford M.** Improving Joyful Lives: Society's Response to Difference and Disability, American Reports Series Issue 8, June 2014, accessed at: https://www.lozierinstitute.org/improving-joyful-lives-societys-response-to-difference-and-disability/

[11] **Mansfield C *et al.*** Termination rates after prenatal diagnosis of Down syndrome, spina bifida, anencephaly, and Turner and Klinefelter syndromes: a systematic literature review, *Prenatal Diagnosis* 19, 808, 1999

[12] **Nicolaides KH *et al.*** Noninvasive prenatal testing for fetal trisomies in a routinely screened first-trimester population. *Am J Obstet Gynecol* 207, 374.e1, 2012

[13] **Britt DW *et al.*,** Determinants of parental decisions after the prenatal diagnosis of Down syndrome: Bringing in context, *American Journal of Medical Genetics* 93, 410, 1999

[14] **Natoli JL *et al.*** Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995-2011), *Prenatal Diagnosis* 32, 142, 2012

[15] **Sullivan N.** The Term "Incompatible with Life" is Incompatible with the Best Care, December 2014, Accessed at: https://www.lozierinstitute.org/the-term-incompatible-with-life-is-incompatible-with-the-best-care/

[16] **Randolph AG *et al.*** Factors explaining variability among caregivers in the intent to restrict life-support interventions in a pediatric intensive care unit, *Crit. Care Med.* 25, 435, 1997

Santorum, will be 7 years old this May. Mrs. Santorum says that "Bella's a little girl with a big message, that every person matters. She's here for a reason."[17]

Indeed, more and more children with genetic conditions like Bella and Kathleen Rose are surviving, and thriving.[18] A recent study by doctors at the Children's Hospital of Philadelphia, published in the journal *Pediatrics,* points out the improvements, noting: "Despite the conventional understanding of these syndromes as lethal, a substantial number of children are living longer than 1 year and undergoing medical and surgical procedures as part of their treatment."[19]

Contrast the prevalent attitude about Down syndrome that leads to a lethal diagnosis, with the recent facts about increased life span, health, learning, and especially satisfaction for those with Down syndrome and their families. A recent study by Skotko *et al.* found that 99% of people with Down syndrome are happy with their lives, 99% of parents said they love their child with Down syndrome, and 97% of brothers/sisters, ages 9-11, said they love their sibling.[20]

Medical science has also improved significantly not only in terms of surgeries to alleviate some of the physical problems associated with Down syndrome, but also in potential pharmaceutical treatments. Bradford notes several clinical trials, all begun within the last five years, with drugs that are hoped will improve cognition for individuals affected by this condition.[21]

Other work has helped elucidate some of the genetic and cellular mechanisms that lead to tissue characteristics associated with Down syndrome. Work with a mouse model has shown that treatment of newborns with a genetic activator has therapeutic potential to improve cognitive function.[22] Another group has shown a laboratory mechanism to remove the third (extra) chromosome from cells in culture,[23] and a different team has provided laboratory evidence for possibly silencing the extra chromosome in a trisomy.[24] A recent 2014 paper used a stem cell model, with cells from Down syndrome patients, to show that certain neural cells called astroglia behave aberrantly in Down syndrome, but that an FDA-approved antibiotic drug, minocycline, can partially correct problems with these cells.[25]

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[17] **Dan Majors.** "Rick and Karen Santorum's book shares daughter's struggle with rare disease," Pittsburgh Post-Gazette, Feb 13, 2015; accessed Feb 16, 2015 at http://www.post-gazette.com/news/state/2015/02/13/Rick-Santorum-s-book-shares-daughter-s-struggle-with-rare-disease/stories/201502130105

[18] **Gann C.** "Trisomy 18 and 13: More Children Like Bella Santorum Survive," ABC News, April 2012, accessed at: http://abcnews.go.com/Health/trisomy-18-kids-bella-santorum-rick-santorums-daughter/story?id=16090571

[19] **Nelson KE *et al.*** Inpatient Hospital Care of Children With Trisomy 13 and Trisomy 18 in the United States, *Pediatrics* 129, 869, 2012

[20] **Skotko BG *et al.*** Self Perceptions from People with Down Syndrome, *American Journal of Medical Genetics* Part A 155, 2360, 2011

[21] **Bradford M.** Ibid

[22] **Das I *et al.*** Hedgehog Agonist Therapy Corrects Structural and Cognitive Deficits in a Down Syndrome Mouse Model, *Science Translational Medicine* 5, 201ra120, September 2013

[23] **Li LB *et al.*** Trisomy Correction in Down Syndrome Induced Pluripotent Stem Cells, *Cell Stem Cell* 11, 615, 2012

[24] **Jiang J *et al.*** Translating dosage compensation to trisomy 21, *Nature* 500, 296, August 2013

[25] **Chen C *et al.*** Role of astroglia in Down's syndrome revealed by patient-derived human-induced pluripotent stem cells. *Nature Communications* 5:4430, doi:10.1038/ncomms5430, July 2014

The commercialized non-invasive prenatal tests have made screening much easier and earlier, but have also presented greater opportunities for selecting against individuals with genetic abnormalities, and not just for chromosome trisomies but for an increasing list of genetic disorders and traits.[26] This should not be the case, but rather these tests should be used, as Dr. Diana Bianchi of Tufts Medical Center has noted, to "develop new approaches to fetal treatment."[27] Fetal surgery is undergoing a rapid expansion as more doctors and parents realize the possibility, and even advantage, of surgery while the child is still within the womb.[28] We are also starting to see some conditions, including genetic abnormalities such as severe immune deficiencies[29] and osteogenesis imperfecta,[30] treated in the womb using adult stem cells or gene therapy. These are very young patients, and should be treated as such.

Donovan and Messner summarized arguments against disability discrimination abortions, provided by disability rights groups in an amicus curiae brief filed with the Supreme Court.[31] These disability rights groups point out: "Though some abortions of children with disabilities involve diagnoses that are likely to be fatal, many involve non-fatal conditions such as Down syndrome, cystic fibrosis, and spina bifida." Even in these non-fatal cases, the statistics are alarming; they note "recent evidence suggests that as many as 95 percent of parents receiving a prenatal diagnosis of cystic fibrosis elect to terminate the child." According to those disability rights groups, the Supreme Court "has never endorsed a right to abort children only because they have been detected to have a disability."

It is often claimed that late-term abortions in particular are largely due to discovery of fetal abnormalities or health of the expectant mother. However, Dr. Priscilla Coleman reported in 2010 (citing the Guttmacher Institute) that "the vast majority of late-term abortions are performed for socio-economic reasons, on a healthy and potentially viable fetus." Her report also states that "Fetal abnormalities or woman's health considerations are rarely the reason for undergoing a late-term abortion."[32] Similar results were reported by Dr. Elizabeth Johnson in 2015, analyzing a paper published in a journal of the Guttmacher Institute.[33] Dr. Johnson points out that rather than the usually-cited reasons of fetal abnormalities or health considerations, women seek abortion because of the stress

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[26] **Wong AIC and Lo YMD.** Noninvasive fetal genomic, methylomic, and transcriptomic analyses using maternal plasma and clinical implications, *Trends in Molecular Medicine* 21, 98, February 2015

[27] **Bianchi DW.** From prenatal genomic diagnosis to fetal personalized medicine: progress and challenges, *Nature Medicine* 18, 1041, July 2012

[28] See, e.g., the Center for Fetal Diagnosis and Treatment, Children's Hospital of Philadelphia, accessed at: http://www.chop.edu/centers-programs/center-fetal-diagnosis-and-treatment

[29] **Loukogeorgakis SP and Flake AW.** In utero stem cell and gene therapy: Current status and future perspectives, *Eur J Pediatr Surg* 24, 237, 2014

[30] **Chan JKY and Götherström C.** Prenatal transplantation of mesenchymal stem cells to treat osteogenesis imperfecta, *Frontiers in Pharmacology* 5, 1, October 201.

[31] **Donovan CA and Messner T.** Twenty-Week Bans Raise Issue of Disability Discrimination Abortion, Charlotte Lozier Institute On Point Series 4; November 2013. Accessed at: https://www.lozierinstitute.org/twenty-week-bans-raise-issue-of-disability-discrimination-abortion-2/ Original brief accessed at: http://sblog.s3.amazonaws.com/wp-content/uploads/2013/11/FILED-AmicusLeJeuneSDiDSC-BDF.pdf, filed by the Bioethics Defense Fund, Scottsdale, Arizona, http://www.bdfund.org/.

[32] **Coleman PK.** Late-term Abortion: Antecedent Conditions and Consequences to Women's Health, The Human Family Research Center, October 2010. Accessed at: http://humanfamilyresearch.org/HFRC%20womens%20health%20and%20late-term%20abortion.pdf

[33] **Johnson E.** The Reality of Late-Term Abortion Procedures, Charlotte Lozier Institute On Point Series 9, January 2015; accessed at: https://www.lozierinstitute.org/the-reality-of-late-term-abortion-procedures/

of "unprepared pregnancy, single-motherhood, financial pressure and relationship discord." She also notes that these stresses "are not fundamentally alleviated or ameliorated by late-term abortion. Indeed, late-term abortion places these women at greater risk of surgical complications, subsequent preterm birth, and mental health problems, while simultaneously ending the life of an unborn child."

SB 334 would provide necessary, distinct protections for developing human beings, preventing discrimination based on genetics or disability. Thank you for the opportunity to contribute to the discussion on this important issue.

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

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

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[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).

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 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

- 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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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

- 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)

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).

(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. 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).

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[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.

- 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.

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[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.

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 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 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

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[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).

[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).

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 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 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-

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

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 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*

[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").

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

[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.

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 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]

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[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.

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

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.

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

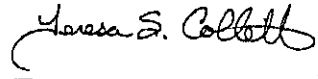
CERTIFICATE OF COMPLIANCE
WITH FEDERAL APPELLATE RULE 32

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