**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, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM,

*Plaintiffs-Appellants*,

vs.

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**
**For the District of Arizona**
**Civil Action No. 2:13-cv-01079-PHX-DGC**
**The Honorable David G. Campbell, Judge**

# APPELLANTS' BRIEF

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants submit the following corporate disclosure statements:

Appellant National Association for the Advancement of Colored People, Maricopa County Branch is a non-profit corporation that operates under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and, as it has no stock, no publicly held company owns 10% or more of its stock.

Appellant National Asian Pacific American Women's Forum is a non-profit corporation that operates under § 501(c)(3) of the Internal Revenue Code. It has no parent corporation and, as it has no stock, no publicly held company owns 10% or more of its stock.

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**CASES**

**CONSTITUTIONS, STATUTES, AND RULES**

**OTHER AUTHORITIES**

## JURISDICTIONAL STATEMENT

**I. District Court's Jurisdiction:** The District Court possessed subject-matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), 1343(a)(4), and the Fourteenth Amendment to the United States Constitution.

**II. Court of Appeals' Jurisdiction:** This Court possesses jurisdiction under 28 U.S.C. § 1291. This appeal is timely under Fed. R. App. P. 4(a)(1)(A). The District Court entered its Order and Final Judgment disposing of Plaintiffs' claims in favor of Defendants-Appellees ("Defendants") on October 3, 2013. (ER 001-013.)[1] Plaintiffs-Appellants ("Plaintiffs") filed a notice of appeal on November 1, 2013. (ER 014-016.)

## STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in holding that Plaintiffs lack standing to challenge a law passed with racially discriminatory intent towards their members because stigmatic injury is never a cognizable injury in fact under Article III, and because Plaintiffs did not otherwise

[1] ER sites refer to the Excerpts of Record in the United States District Court for the District of Arizona.

allege that they were denied a benefit or prevented from exercising a right.

## PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

### Ariz. Rev. Stat. Ann. § 13-3603.02. Abortion; sex and race selection; injunctive and civil relief; failure to report; definition

A. A person who knowingly does any of the following is guilty of a class 3 felony:

1. Performs an abortion knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child.

2. Uses force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing a sex-selection or race-selection abortion.

3. Solicits or accepts monies to finance a sex-selection or race-selection abortion.

B. The attorney general or the county attorney may bring an action in superior court to enjoin the activity described in subsection A of this section.

C. The father of the unborn child who is married to the mother at the time she receives a sex-selection or race-selection abortion, or, if the mother has not attained eighteen years of age at the time of the abortion, the maternal grandparents of the unborn child, may bring a civil action on behalf of the unborn child to obtain appropriate relief with respect to a violation of subsection A of this section. The court may award reasonable attorney fees as part of the costs in an action brought pursuant to this subsection. For the purposes of this subsection, "appropriate relief" includes monetary damages for all injuries, whether psychological, physical or financial, including loss of companionship and support, resulting from the violation of subsection A of this section.

D. A physician, physician's assistant, nurse, counselor or other medical or mental health professional who knowingly does not report known violations of this section to appropriate law enforcement authorities shall be subject to a civil fine of not more than ten thousand dollars.

E. A woman on whom a sex-selection or race-selection abortion is performed is not subject to criminal prosecution or civil liability for any violation of this section or for a conspiracy to violate this section.

F. For the purposes of this section, "abortion" has the same meaning prescribed in § 36-2151.

**Ariz. Rev. Stat. Ann. § 36-2157. Affidavit.**

A person shall not knowingly perform or induce an abortion before that person completes an affidavit that:

1. States that the person making the affidavit is not aborting the child because of the child's sex or race and has no knowledge that the child to be aborted is being aborted because of the child's sex or race.

2. Is signed by the person performing or inducing the abortion.

**United States Constitution, Fourteenth Amendment, Section 1.**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

### Statement of the Facts

#### *The Challenged Act*

On March 29, 2011, Arizona enacted House Bill 2443 ("the Act"), the "Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011." (ER 021, 023 ¶¶ 13, 25.) The Act—codified at Ariz. Rev. Stat. Ann. §§ 13-3603.02 and 36-2157—has three substantive prohibitions relating to what it terms race- and sex-selection abortions:

- The Act prohibits any person from knowingly "perform[ing] an abortion knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child." Ariz. Rev. Stat. Ann. § 13-3603.02(A)(1).
- It also prohibits any person from knowingly "us[ing] force or the threat of force to intentionally injure or intimidate any person for the purpose of coercing a sex-selection or race-selection abortion." Ariz. Rev. Stat. Ann. § 13-3603.02(A)(2).[2]
- Finally, the Act prohibits any person from knowingly "solicit[ing] or accept[ing] monies to finance a sex-selection or race-selection abortion." Ariz. Rev. Stat. Ann. § 13-3603.02(A)(3).

[2] Pre-existing Arizona law already made it unlawful to coerce a woman into having an abortion for any reason. *See* Ariz. Rev. Stat. Ann. § 36-2153(A)(2)(d).

Violation of any of these provisions is a Class 3 felony, Ariz. Rev. Stat. Ann. § 13-3603.02(A), and the Attorney General or a County Attorney may bring an action to enjoin any conduct prohibited by these provisions. Ariz. Rev. Stat. Ann. § 13-3603.02(B). The Act went into effect July 20, 2011. (ER 021 ¶ 13.)

Any doctor who knowingly performs or induces an abortion must complete an affidavit before the abortion stating that (1) he or she is not providing the abortion care because of the race or sex of the embryo or fetus, and (2) he or she has no knowledge that the embryo or fetus is being aborted because of its sex or race. (ER 022-023 ¶ 24 (citing Ariz. Rev. Stat. Ann. § 36-2157).) This affidavit will be permanently stored in the woman's medical files. (ER 023 ¶ 25.)

The Act also creates a private cause of action "on behalf of the unborn child" and the woman's husband at the time of the abortion, or the woman's parents (if the woman is not yet eighteen years old at the time of the abortion) to recover damages from a physician who performs a race- or sex-selection abortion, even if the pregnancy is the result of the husband's or father's criminal conduct. (ER 022 ¶¶ 21, 22 (citing

Ariz. Rev. Stat. Ann. § 13-3603.02(C).) And yet, it does not give the woman herself any legal right of action. (*Id.* at ¶ 23.)

***The Act's Legislative History and Intent***

The Act's stated purpose is to "protect unborn children from prenatal discrimination in the form of being subjected to abortion based on the child's sex or race." (ER 023 ¶ 25.) However, neither the Act's sponsors nor its supporters identified a single example of a race- or sex-selection abortion in Arizona. (ER 023 ¶ 27.) Nonetheless, the Arizona Legislature justified the law on two grounds: (1) that the relatively high rate of abortion among Black women proved that they were terminating their pregnancies in order to "de-select" members of their own race, and (2) that evidence of sex-selection abortions occurring in China and India, together with the future immigration of Asian Pacific Islander ("API") women to Arizona, will inevitably lead to sex-selection abortions by API women in the state. (ER 023 ¶ 26.) During consideration of the Act no legislator discussed the abortion rates of women of other races, or practices in countries other than China and India. Indeed, no other race was singled out for discussion during the legislative debates. Thus, the Act was motivated entirely by the legislators' negative racial

stereotypes about the reasons Black and API women may decide to end a pregnancy.

*1. The ban on race-selection abortions.*

The legislative sponsors justified the ban on race-selection abortions solely by their interpretation of the rate of abortion among Black women. The Act's primary sponsor, Representative Montenegro, explained that the ban was necessary "because minority babies are several times more likely to be aborted than white babies," and that "some abortions are performed because a mother does not want a . . . minority baby." (ER 023-024 ¶ 30.) Another Senator read into the legislative record a letter from U.S. Congressman Trent Franks in support of the Act, stating that "African-American babies are now aborted at five times the rate of White babies . . . . We criticize other nations for human right [sic] abuses; at the same time, we look the other way while our own children are being killed simply *because* [they are] the wrong . . . race." (ER 024 ¶ 31 (emphasis added).) Many of the Act's other supporters also pointed to the rate of abortion among Black women in Arizona as evidence that race-selection abortion is taking place. (ER 024 ¶ 32.) Indeed, the primary explanation for the rate of

abortion among Black women offered by the Act's supporters was a desire to reduce the number of Black people in our society. (ER 024-025 ¶¶ 32, 33.) The legislators did not consider any of the myriad other economic or societal reasons that explain the rate without resorting to racial typecasting.

In a twist on the notion that Black women want to eliminate the Black community, supporters of the ban on race-selection abortion also claimed that Black women are vulnerable to medical providers purportedly plotting to eliminate the Black race through abortion. (ER 025 ¶¶ 34, 36.) That is, the Act's supporters maintained that Black women are being duped and thus require government protection. (ER 025 ¶¶ 34, 36.) The legislative history contains not a shred of evidence explaining why Black women—but not women of any other race—are incapable of deciding whether to end a pregnancy in a way that is intelligent, thoughtful, and worthy of the Legislature's respect. (ER 025 ¶ 36.)

*2. The ban on sex-selection abortions.*

The legislative history concerning the ban on sex-selection abortions is also demonstrably based on negative racial stereotypes. To

justify the ban on sex-selection abortions, the Legislature invoked reports of such abortions in China and India, the present and future immigration of API women to Arizona, and nothing more. (ER 026 ¶¶ 42-44.) For example, Senator Murphy stated when explaining his vote: "We know that it's something that is pervasive in some areas. We know that people from those countries and from those cultures are moving and immigrating in some reasonable numbers to the United States and to Arizona." (ER 026 ¶ 45.) Another Senator pointed to the threat of API women immigrating to the state as reason to support the Act: "We have to admit what is happening. The trend lines are there. With a multicultural society as America is becoming more of, we have to guard against that." (ER 026 ¶ 46.) That same Senator, on the day the bill passed, said, "[w]e are a multicultural society now and cultures are bringing their traditions to America that really defy the values of America, including cultures that value males over females." (ER 027 ¶ 46.) At no point during the debates did the legislators consider evidence of women of any other races allegedly seeking sex-selection abortions: The Legislature instead singled out only API women. (ER 026 ¶ 41.)

No legislator presented evidence of any woman of any race having an abortion in Arizona to prevent the birth of a female (or male) baby. (ER 027-028 ¶¶ 48, 49.) Indeed, Arizona's own data—available to the Legislature when it passed the Act—showed that the gender ratio among babies born to API women was no different from the ratio among babies born to other women in Arizona. (ER 028 ¶ 50.) That data also demonstrated that 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). (ER 028 ¶ 51.)

### ***Relevant Procedural History***

On May 29, 2013, Plaintiffs National Association for the Advancement of Colored People, Maricopa County branch ("NAACP") and the National Asian Pacific American Women's Forum ("NAPAWF")—two non-profit organizations whose members include Black and API women of childbearing age living in Arizona who have sought or will seek abortion care—filed this case on behalf of their members in the District Court of Arizona. (ER 017-071.) Plaintiffs claim that the law, which the Legislature based explicitly on nothing more

than invidious racial stereotypes about the reasons Black and API women decide to end a pregnancy, singles out their members and stigmatizes their abortion decisions. As set forth in the Complaint, the Act's sponsors and supporters were motivated by their conviction that Black and API women behave a certain way simply because they are Black and API women. This unprecedented and blatant attempt to disparage and control the private decisions of Black and API women violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and Plaintiffs therefore seek injunctive and declaratory relief.

On July 22, 2013, Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (Def. Tom Horne's Mot. to Dismiss for Lack of Juris. & Failure to State a Claim, ECF No. 25.) Defendants argued that Plaintiffs failed to demonstrate injury in fact and therefore lacked standing, and that Plaintiffs failed to state an Equal Protection violation because they did not allege that their members had been denied equal treatment.

In their brief filed on September 6, 2013, Plaintiffs opposed Defendants' motion on both grounds. (Pls.' Resp. to Def. Tom Horne's

Mot. to Dismiss for Lack of Juris. & Failure to State a Claim, ECF No. 39.) Plaintiffs argued that their members' stigmatic injuries were sufficient for standing under Article III and that their allegations that the challenged Act was passed with the racially discriminatory intent to monitor Plaintiffs' members' decisions to end a pregnancy were sufficient to state an Equal Protection violation.

On October 3, 2013, the District Court granted Defendants' motion to dismiss solely on the ground that Plaintiffs lack standing under Fed. R. Civ. P. 12(b)(1), and entered a final judgment in favor of Defendants. (ER 001-013.) On November 1, 2013, Plaintiffs filed their notice of appeal. (ER 014-016.)

### *Ruling Presented for Review*

Plaintiffs seek review of the District Court's dismissal of their claim for lack of standing, which encompassed two legal errors. First, the District Court held that the stigmatic injury here at issue—inflicted upon Black and API women living in Arizona when the Legislature passed a law enshrining invidious stereotypes about the reasons Black and API women decide to end a pregnancy—is per se insufficient to confer standing under Article III. (ER 008.) Second, the District Court

ignored longstanding precedent holding that a statute motivated by discriminatory intent toward identified racial groups is subject to challenge by members of those targeted groups, even if that law does not deny them access to a benefit or prevent them from exercising a right. (ER 008.)

## STANDARD OF REVIEW

Standing is a question of law and thus this Court reviews a District Court's dismissal for lack of standing *de novo*. *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969 (9th Cir. 2003). "'For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint and must construe the complaint in favor of the complaining party.'" *Maya v. Centex Corp.*, 658 F.3d 1060, 1068 (9th Cir. 2011) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). At this early stage in the litigation, "'general factual allegations of injury resulting from the defendant's conduct may suffice.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

## SUMMARY OF THE ARGUMENT

The crux of the standing inquiry "is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (en banc) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007)). Because Plaintiffs' members comprise precisely the discrete and identifiable group that the Act denigrates, stigmatizes, and intentionally targets, they have the requisite "personal stake."

Plaintiffs brought this lawsuit on behalf of their members to challenge the Arizona Legislature's brazen and explicit reliance on invidious racial stereotypes about the reasons Black and API women decide to end a pregnancy. During open debate the Arizona Legislature unambiguously justified the Act on the ground that some racial characteristic common to Black and API women leads them to have race- and sex-selection abortions. The Legislature singled out Plaintiffs' members with the intent of monitoring the reasons they seek abortions,

simply because they are Black and API women. Such intentional government discrimination, and endorsement and perpetuation of offensive racial stereotypes, inflicts serious constitutional injury in fact on Plaintiffs' members, who therefore have standing to pursue this Equal Protection challenge.

Defendants did not dispute Plaintiffs' factual allegations and the District Court accepted them as true, as it was required to do in ruling on a motion to dismiss. (ER 006.) Nonetheless, ignoring longstanding precedent, the District Court held that Plaintiffs lack standing because they did not allege "that their members personally have been denied equal treatment by the Act," (ER 008), and because, as a per se matter, "[s]tigmatic injury does not suffice under *Allen* [*v. Wright*, 468 U.S. 737 (1984)]," (ER 013.) This is incorrect as a matter of law.

First, the Supreme Court and lower courts, including this one, have long recognized that stigmatic harm is sufficient to confer standing in certain contexts. *Allen v. Wright* in no way changes this result. At this initial stage, Plaintiffs have met their burden to demonstrate that this case is precisely the context in which stigmatic harm constitutes injury in fact.

Second, longstanding precedent establishes that laws passed with a racially discriminatory intent violate Equal Protection, even if those laws do not "den[y] equal treatment," (ER 008), in the manner the District Court held Plaintiffs must show. Individuals who are targeted by laws intended to discriminate against racial groups may challenge those laws to vindicate their right to Equal Protection. Plaintiffs adequately alleged that the Act was enacted with the racially discriminatory intent to monitor the reasons their members may decide to end a pregnancy.

For both of these reasons, Plaintiffs have alleged injury in fact and therefore have standing to challenge the Act. This Court should reverse the order dismissing their claim.

## ARGUMENT

### I. THE DISTRICT COURT ERRED IN RULING THAT STIGMATIC INJURY IS PER SE NON-COGNIZABLE AS INJURY IN FACT.

Article III requires three elements for standing: "(1) injury in fact, (2) causation, and (3) likelihood that a favorable decision will redress the injury." *Preminger v. Peake*, 552 F.3d 757, 763 (9th Cir. 2008) (citing *Lujan*, 504 U.S. at 560-61). An injury in fact is "an invasion of a legally

protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citing *Lujan*, 504 U.S. at 560) (internal quotation marks omitted). Only the first prong—injury in fact—is at issue on this appeal.[3]

It is well established that Article III standing "may be predicated on noneconomic injury." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 496 (1982) (citing *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686-88 (1973)); *see also Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 937 (9th Cir. 1987) ("Non-economic criteria are as valid a measure of personal injury as economic criteria."). Further, "[t]he Supreme Court has articulated a broad conception of Article III standing to bring equal protection

[3] It is clear and undisputed that Defendants' passage of the Act in reliance on race-based stereotypes has directly caused Plaintiffs' stigmatic injuries, and a court order holding that the Act violates the Equal Protection Clause would redress those injuries by invalidating the law. *See Catholic League*, 624 F.3d at 1053 ("By declaring the resolution unconstitutional, the official act of the government becomes null and void. Even more important, a declaratory judgment would communicate to the people of the plaintiffs' community that their government is constitutionally prohibited from condemning the plaintiffs' religion, and that any such condemnation is itself to be condemned.").

challenges," in particular. *Braunstein v. Ariz. Dep't of Trans.*, 683 F.3d 1177, 1184 (9th Cir. 2012); *see also Wood v. City of San Diego*, 678 F.3d 1075, 1083 (9th Cir. 2012) ("[F]ederal courts take a broad view of constitutional standing in civil rights cases . . . ."). Indeed, courts have long recognized that the noneconomic "stigmatizing injury often caused by racial discrimination" can be "one of the most serious consequences of discriminatory government action." *Allen*, 468 U.S. at 755. In light of this, the District Court erred in holding that the stigmatic injury alleged in the Complaint cannot constitute cognizable injury in fact.

### A. The Supreme Court Has Repeatedly Recognized That Stigma Can Inflict Actual, Concrete Injury.

The Supreme Court has recognized in a variety of contexts the real injuries that citizens suffer when their government relies on stereotypes or denigrates entire classes of people.

Most significantly, in *Brown v. Board of Education*, the Court recognized that stereotypes and race-based classifications that carry the imprimatur of the government can have profound damaging psychological effects on a person's identity and ego. In that case, the Court famously held that separate education facilities, even if equal with respect to "tangible" factors, violated Equal Protection because of

the stigmatic harms of segregation: "Segregation of white and colored children . . . . when it has the sanction of the law . . . . denot[es] the inferiority of the negro group." 347 U.S. 483, 494 (1954). The Court also found that objective psychological evidence demonstrated that the mere fact of separate treatment with "the sanction of law" "has a detrimental effect upon the colored children" in that "[a] sense of inferiority affects the motivation of a child to learn." *Id.* Such government-endorsed segregation "has a tendency to retard the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racially integrated school system." *Id.*[4]

The clear lesson from *Brown* is that even absent disparate treatment—that is, even when all things can theoretically be "separate but equal"—the long-term psychological and societal effects of racial stigmatization resulting from state action are cognizable under Article III.

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[4] In his prescient dissent in *Plessy v. Ferguson*, which *Brown* overruled, Justice Harlan explained that the "real meaning" of the segregation laws was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens" and that the segregation policy at issue imposed a "brand of servitude and degradation upon a large class of our fellow citizens." 163 U.S. 537, 560, 562 (1896) (Harlan, J., dissenting).

*Brown*'s discussion of stigma is perhaps the most famous, but it is far from unique. The Supreme Court has repeatedly recognized that laws relying on racial stereotypes or classifications inflict cognizable, stigmatic harm on the targets of state-endorsed discrimination. Such laws reduce individuals to a single characteristic, based upon which they are presumed to act or think, thus denying them full recognition of their autonomy and individuality. *See Shaw v. Reno*, 509 U.S. 630, 643, 647 (1993) (when the government draws electoral redistricting lines on the basis of race in order to create majority-minority districts, such "[c]lassifications of citizens solely on the basis of race . . . threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility" and "reinforce[] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls.") (citations omitted); *Miller v. Johnson*, 515 U.S. 900, 912 (1995) ("Race-based assignments embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to

the Government by history and the Constitution.") (citation and internal quotation marks omitted).

Laws based on stereotypes also signal to the public that it is acceptable to rely on those stereotypes and to view the stigmatized as less than equal and "other." *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."); *see also SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 482 (9th Cir. 2014) (explaining that the Supreme Court, in invalidating a law that defined marriage for federal purposes as between a man and a woman, was "concerned with the public message sent by [the law] about the status occupied by gays and lesbians in our society. *This government-sponsored message was in itself a harm of great constitutional significance*.") (citing *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (emphasis added)); *Plessy* 163 U.S. at 560, 562 (Harlan, J., dissenting).

And such laws make the injured feel that "they are not full members of the political community." *See Lynch v. Donnelly*, 465 U.S.

668, 688 (1984) (O'Connor, J., concurring) (explaining that when government singles out one religion or religion generally for favored treatment, that "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community"); *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 208 (1972) (tenants who alleged that building owner's discriminatory policies "stigmatized" them as residents of a "white ghetto" stated sufficient actual injury).

Consistent with this longstanding precedent, courts, including this one, have recognized that stigmatic injury can indeed be a cognizable injury in fact. For instance, in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, a Catholic civil rights organization and two devout Catholics challenged a city resolution that, in part, "urg[ed] Cardinal William Levada . . . to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households." 624 F.3d at 1047. The plaintiffs claimed that the resolution injured them insofar as it "convey[ed] a government

message of disapproval and hostility toward their religious beliefs." *Id.* at 1048. This Court agreed, even though the law did not affect them directly or "den[y them] equal treatment," (ER 008), inasmuch as it did not deny them any benefit or prevent them from exercising any right, *Catholic League*, 624 F.3d at 1052-53; *see also Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 782-83, 785 (9th Cir. 2008) (holding that "lesbians and agnostics" had suffered a stigmatic injury sufficient to confer standing to challenge a city's lease of public property to the Boy Scouts who "publicly disapproved" of plaintiffs, even though the plaintiffs had never applied to use the facilities, nor had they been excluded, but only *felt* "deterred . . . from using the land"); *Awad v. Ziriax*, 670 F.3d 1111, 1122-23 (10th Cir. 2012) (holding that a Muslim resident had standing to challenge the stigmatic injury of a state constitutional amendment banning reliance on Sharia law in state courts, in part because he alleged that "the amendment condemns his religion").[5]

[5] There is simply no reason to view these cases as cabined to Establishment Clause claims, as the District Court did. (ER 010-013.) The Supreme Court has explicitly rejected the view that standing doctrine under the Establishment Clause is the product of "special exceptions," *Valley Forge*, 454 U.S. at 488, and has similarly applied

Similarly, in *Smith v. City of Cleveland Heights*, a case the District Court summarily rejected, (ER 010, 013),[6] the Sixth Circuit held that Smith, a Black resident, had standing to challenge his city's racial steering housing policy, even though he had not been personally "denied equal treatment," (ER 008), under the policy. Smith challenged a city housing policy that strove to maintain a racial composition of 75% white and 25% Black residents. 760 F.2d 720, 721 (6th Cir. 1985).

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standing analysis from cases brought under the Establishment Clause in other contexts. *See, e.g.*, *Allen*, 468 U.S. at 754 (applying analysis from *Valley Forge* when evaluating standing under the Equal Protection Clause); *Apache Bend Apartments, Ltd. v. United States*, 987 F.2d 1174, 1176, 1180 (5th Cir. 1993) (same); *Rocks v. City of Philadelphia*, 868 F.2d 644, 646, 648-49 (3d Cir. 1989) (same). Courts likewise apply standing analysis from Equal Protection cases when assessing Establishment Clause claims. *See, e.g., Barnes-Wallace*, 530 F.3d at 785 (relying on *Allen v. Wright* when analyzing plaintiffs' standing under the Establishment Clause); *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1016 (9th Cir. 2010) (same). Were the District Court correct, then had the Arizona Legislature relied on stereotypes about Muslim women's decisions to end a pregnancy, Muslim women would have standing to challenge such a law, where Plaintiffs' Black and API members would not here, a plainly absurd result.

[6] The District Court rejected *Cleveland Heights* out of hand—on the grounds that it was from the Sixth Circuit, "is not binding on this Court[,] and is simply unpersuasive"—without providing any analysis. (ER 010.) However, decisions from sister circuits are entitled to respect and due consideration. *See, e.g.*, *Int'l Ass'n of Machinists & Aerospace Workers v. BF Goodrich Aerospace Aerostructures Grp.*, 387 F.3d 1046, 1050 (9th Cir. 2004) ("Our sister circuits' approach is persuasive.").

Because Smith was a resident of the city who had not been "steered away," the city argued that he had suffered no actual injury and thus lacked standing. *Id.* Smith countered that "the steering policies stigmatize him as an inferior member of the community in which he lives: that by effectively limiting other blacks' access to Cleveland Heights, the municipal policies brand black residents as less desirable than whites." *Id.* at 722. The Sixth Circuit agreed and held that Smith had satisfied the standing requirements as set forth in *Allen v. Wright*.

> The City's policy directly affects Smith's interest in his own self-respect, dignity and individuality as a person in his own town . . . . The City is essentially saying that, although Smith's presence in the community may not be undesirable, the presence of any more members of Smith's race is undesirable . . . . [T]he black citizen must live on a daily basis with a sense of disrespect officially established as law.

*Id.* at 722.

In sum, contrary to the District Court's holding, these cases make abundantly clear that our government cannot alienate or vilify entire groups of people based on their race; that it is improper for the government to rely on or endorse stereotypes about such groups when legislating or carrying out other official acts; and that citizens suffer real and concrete injuries when their government violates these

principles. *See generally Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630-31 (1991) ("If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.").

### B. The District Court Erred in Concluding that Under *Allen v. Wright*, Stigmatic Injury is Never a Cognizable Injury in Fact.

Despite this longstanding recognition of stigmatic harm, the District Court below misinterpreted the Supreme Court's decision in *Allen v. Wright* as announcing a per se rule: That "the stigmatizing effects of a racially discriminatory law is not sufficient for standing." (ER 010.) The District Court therefore dismissed the case for lack of standing. (ER 013.) However, a closer examination of *Allen*—of both the facts and the plain language of the decision—only reaffirms that in certain contexts stigmatic injury alone is sufficient for standing purposes.

*Allen* involved a nationwide class of "several million persons" who were all "parents of black children attending public school systems undergoing, or which may in the future undergo, desegregation." 468

U.S. at 743. The IRS had already announced a policy denying tax-exempt status to schools with racially discriminatory admissions criteria. *Id.* at 740-43. However, the plaintiffs alleged that the IRS was not enforcing this policy aggressively enough and challenged its failure to "fulfill its obligation to deny tax-exempt status to racially discriminatory private schools." *Id.* at 739. They did not allege a denial of equal treatment in the sense the District Court here used that term;[7] instead, they claimed an injury from "the denigration they suffer as black parents and schoolchildren when their government graces with tax-exempt status educational institutions in their communities that treat members of their race as persons of lesser worth." *Id.* at 749. That is, they claimed a stigmatic injury stemming solely from the IRS's alleged failure to enforce the new tax exempt policy to the greatest extent possible. But the government's tax exempt policy—far from lending government imprimatur to race discrimination, as the Act does

[7] For example, the plaintiffs had "no interest whatever in enrolling their children in private school," *Allen*, 468 U.S. at 746; they did not allege that their children had "been the victims of discriminatory exclusion from the schools whose tax exemptions they challenge as unlawful," *id.*; nor could they demonstrate that the tax exempt status of those private schools harmed their children's schools.

in this case—clearly condemned it. The plaintiffs' alleged injury, unsurprisingly, was too indirect and generalized to satisfy Article III.

In rejecting the plaintiffs' claim, the *Allen* Court compared the case to three other cases, none of which concerned the question before this Court: Whether and when stigmatic injury derived from legislation based explicitly on racial stereotypes constitutes injury in fact to—and thus confers standing on—members of the stereotyped racial group. *Allen*, 468 U.S. at 755 (discussing *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974) (holding that the plaintiffs lacked standing, in part, because they failed to demonstrate the "real and immediate threat of repeated injury" from allegedly discriminatory city practices); *Rizzo v. Goode*, 423 U.S. 362, 372 (1976) (same); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 168, 171 (1972) (holding that plaintiff discriminated against while guest of club had standing to challenge discriminatory policies towards guests, but lacked standing to challenge discriminatory membership policy, since he was not harmed under that policy)). Indeed, none of those cases even mentions the word stigma.[8] Thus, it is evident that the *Allen* Court

[8] The Supreme Court in *Allen* also relied heavily on *Valley Forge*, but that case is inapposite, too. In *Valley Forge*, the Court held that those plaintiffs lacked standing because, unlike Plaintiffs here, they failed to

viewed the claim as one using stigmatic injury in a veiled attempt to challenge an alleged failure to act that simply did not affect and was not directed toward, the plaintiffs.

Here, the District Court ignored not only the distinguishing facts of *Allen*, but also the plain text of the decision. In ruling that the *Allen* plaintiffs lacked standing, the Supreme Court wrote:

> Neither do they have standing to litigate their claims based on the stigmatizing injury often caused by racial discrimination. There can be no doubt that this sort of

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"allege[] an injury of *any* kind, economic or otherwise." 454 U.S. at 486. The plaintiffs—a Washington, D.C.-based non-profit organization with 90,000 "taxpayer members" nationwide, and four named plaintiffs—challenged the federal government's transfer of property to Valley Forge Christian College in Pennsylvania under the Establishment Clause. *Id.* at 469, 486-87. The plaintiffs, none of whom resided in Pennsylvania and all of whom learned of the conveyance only through a news release, claimed the transfer deprived them of the "fair and constitutional use of their tax dollar." *Id.* at 469, 476, 487. The Court held that while the plaintiffs had "claimed that the Constitution has been violated, they . . . fail[ed] to identify any personal injury suffered by them *as a consequence* of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees." *Id.* at 485. This generalized grievance had long been foreclosed by "unambiguous limitations on taxpayer and citizen standing." *Id.* at 476, 488. It was unsurprising, then, that the Court rejected the plaintiffs' "unusually broad and novel view of standing" and reaffirmed its earlier precedents that limited taxpayer and citizen standing. *Id.* at 470, 476-87. Importantly, however, in so holding the Court did "not retreat from [its] earlier holdings that standing may be predicated on noneconomic injury." *Id.* at 486 (citing *SCRAP*, 412 U.S. at 686-88).

> noneconomic injury is one of the most serious consequences of discriminatory government action *and is sufficient in some circumstances to support standing*. Our cases make clear, however, that such injury accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct.

468 U.S. at 755 (citing *Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984)) (emphasis added). This persuasive and deliberate statement by the Supreme Court that stigmatization "*is sufficient in some circumstances to support standing*" directly undermines the District Court's holding that stigmatic injury by itself is never cognizable. The District Court erroneously concluded that in order to have standing, rather than allege stigmatic harm, Plaintiffs would have had to allege that "their members have been or will be denied abortions or other medical care, [or] that their members have been or will be threatened with enforcement or liability under the Act." (ER 008.) But nothing in *Allen* even suggests such a narrow meaning of "equal treatment." *See also infra* Part II. *Allen* merely stands for the uncontroversial proposition that only those persons who are directly subject to or targeted by a law's racially stigmatic effect have standing to challenge that law.

Indeed, subsequent cases confirm this reading of the Supreme Court's standing jurisprudence. For example, in *Shaw v. Reno*, the

Court expressly rejected the argument that *only* a plaintiff who could prove that his or her vote had been diluted had standing to challenge racial gerrymandering. 509 U.S. at 650. Instead, the Court held,

> [R]eapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole.

*Id.* In *Shaw*, as here, it was the reliance on racial stereotypes that caused constitutional injury, not any direct interference with the right to vote. *See also Powers v. Ohio*, 499 U.S. 400, 411 (1991) (holding that criminal defendant had standing to challenge use of race-based preemptory challenges even though defendant could not show that "the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant").

Simply put, this case is a far cry from *Allen*. Plaintiffs are not using this litigation as a vehicle to ensure that their "[g]overnment act in accordance with law," to challenge mere government inaction, or to enforce the legal interests of others. *Allen*, 468 U.S. at 754; *see also Valley Forge*, 454 U.S. at 473 ("concerned bystanders" have not suffered

an injury sufficient for Article III); *Warth*, 422 U.S. at 499 (a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

Rather, Plaintiffs challenge their government's explicit reliance on denigrating stereotypes about their members and one of the most personal decisions they have made or may make—whether to end a pregnancy. Their offense is not attenuated or on behalf of other injured women. They are the precise women who have suffered the stigmatic injury, and there is no more direct plaintiff to challenge the Act. *See Catholic League*, 624 F.3d at 1052 ("A 'psychological consequence' does not suffice as concrete harm where it is produced merely by 'observation of conduct with which one disagrees.' But it does constitute concrete harm where the 'psychological consequence' is produced by government condemnation of one's own religion or endorsement of another's in one's own community." (quoting and distinguishing *Valley Forge*, 454 U.S. at 485)); *see also Cleveland Heights*, 760 F.2d at 723 ("Smith's relationship to the source and situs of his injury is far from attenuated or generalized. The source of his injury is a local governmental policy tailored expressly to shape the racial composition of his community. The

situs is the very community in which he lives. These direct and concrete connections demonstrate that Smith's injury is 'peculiar to himself or to a distinct group of which he is a part,' and that he is 'personally subject to the challenged discrimination.'" (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979)); *Allen*, 468 U.S. at 755.

Furthermore, Plaintiffs are no more obligated to show that they have been prevented from obtaining an abortion or subject to criminal liability under the Act than, for example, the plaintiffs in *Shaw* were obligated to show that race-based districting in any way impacted the power or efficacy of their votes, or the outcomes of elections. The harm in all of these cases—including this one—is the reliance on race-based stereotypes regardless of their practical effect. The District Court thus incorrectly held that the stigmatizing effects of racial stereotypes are per se insufficient to confer Article III standing.

### C. The Complaint Adequately Alleges that the Act Inflicts Stigmatic Injury on Plaintiffs' Members.

It is rare today to encounter a law whose sponsors and supporters brazenly and explicitly endorse it by relying on invidious racial stereotypes. But that is precisely what happened here. Plaintiffs' complaint is replete with allegations demonstrating that the

Legislature relied almost exclusively on negative racial stereotypes about the reasons Black and API women may have abortions, simply because they are Black and API women. These allegations are sufficient to support Plaintiffs' claims that their members have suffered stigmatic injuries by their own government.

The District Court did not find that Plaintiffs' members had not suffered a stigmatic injury as a result of the Legislature's reliance on racial stereotypes. (*See* ER 007.) Rather, ignoring Supreme Court and Ninth Circuit precedent, it held that this injury is never cognizable. (ER 008.) Plaintiffs' allegations, which must be accepted as true, show that the Act injures Plaintiffs' members by casting them as presumptively suspect of seeking race- or sex-selection abortions, based on their race alone. *See Maya*, 658 F.3d at 1068; (ER 023-024, 027 ¶¶ 26, 30, 44-47).

As set out in the well-pled Complaint, there is no question that Plaintiffs have a "personal stake" in the outcome of this case. For instance, without inquiring into or addressing other relevant and plausible explanations for the rate of abortion among Black women, the only evidence the Legislature offered to support the fact that race-selection abortion was taking place in America was the rate of abortion

among Black women, *see, e.g.*, (ER 046:11-13 ("Black babies are aborted at five times the rate as white babies.")); (ER 058:15-17 (explaining that "legal abortion" (not "heart disease") is "the leading cause of death in the American Black community").) Underlying this assertion is the obvious fact that the decision whether to have an abortion rests with the woman and that the rate of abortion among Black women is determined by the number of Black women who choose to have abortions. The Legislature therefore assumed that Black women must be seeking abortions at a greater rate than are other women because they are "discriminat[ing]" against their own fetuses, using abortion out of racial animus to prevent the birth of Black babies. (ER 045:2.) It is difficult to conceive of a more offensive race-based stereotype—that any Black woman seeking an abortion should be suspected of what the Legislature equated to a hate crime—being enshrined into law.[9]

Appellant NAPAWF's members similarly endure the "daily experience of contact with a government that officially" announced that

[9] To the extent the Legislature also assumed that Black women are manipulated by abortion providers into having race-selection abortions, the law is no less discriminatory, (*see* ER 042-044, ER 053-054, ER 061-063), for it is based on the premise that Black women, but not women of other races, are simply incapable of deciding on their own whether to have an abortion, or have abortions without full awareness or thought.

absent the law, they would use abortions to de-select female fetuses. *Catholic League*, 624 F.3d at 1052 n.33. As Senator Murphy put it when explaining his vote:

> We know that it's something that is pervasive in some areas. We know that people from those countries and from those cultures are moving and immigrating in some reasonable numbers to the United States and to Arizona. And so with that in mind, why in good conscience would we want to wait until the problem does develop and bad things are happening and then react when we can be proactive and try to prevent the problem from happening in the first place.

(ER 068:20-069:7); *see also* (ER 070:18-21 ("We have to admit what is happening. The trend lines are there. With a multicultural society as America is becoming more of, we have to guard against that.")); (ER 066:11-16 ("Now it's not yet to the impact that has happened in China and India, but China and India have now banned the practice because it's been so devastating to them. My point being that it's time for the United States to do the same and be proactive and do the same.").) Other supporters warned that as America becomes more of a "multicultural society," Arizona will "have to guard against" sex-selection abortion because of the threat API women present to the state. (ER 070:20-21.) Otherwise, Arizona could "become a . . . safe haven for people of other countries who want to sex select." (ER 061:4-6.)

The legislative supporters failed to acknowledge, or to even consider, that according to Arizona's own data, which were available to them at the time they debated the Act, there was no discrepancy in the gender ratios of births to API women and of births to other women in Arizona. (*See* ER 028 ¶ 50 (citing Ariz. Dep't of Health Servs., Arizona Health Status and Vital Statistics 2009 Report, Induced Terminations of Pregnancy, Table 1B-5, 1B-6, 1B-8, 1B-10, 1B-12, 1B-14, *available at* http://www.azdhs.gov/plan/report/ahs/ahs2009/t1b.htm).) This direct xenophobic attack on API women and the Asian-American community as a whole has rarely, if ever, been seen in this country's state legislatures, at least since the beginning of the last century.[10]

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[10] *See, e.g.*, *Hirabayashi v. United States*, 828 F.2d 591, 596 (9th Cir. 1987) ("The Justice Department . . . argued that because of cultural characteristics of the Japanese Americans, including religion and education, it was likely that some, though not all, American citizens of Japanese ancestry were disloyal."); *Oyama v. California*, 332 U.S. 633, 668-69 (1948) (in describing legislative history of Alien Land Law, stating "[Japanese] are said to constitute a menace, a 'yellow peril,' to the welfare of California. They are said to be encroaching on the agricultural interests of American citizens. They are said to threaten to take over all the rich farm land of California.") (Murphy, J., concurring); *Korematsu v. United States*, 323 U.S. 214, 237-38 (1944) ("Individuals of Japanese ancestry are condemned because they are said to be 'a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.") (Murphy, J., dissenting) (citations omitted).

Unsatisfied by their public endorsement of offensive racial stereotypes, the Arizona Legislature went further and invited the public to view Black and API women—but not other women—with suspicion, and required physicians to monitor the reasons they may decide to end a pregnancy. The affidavit requirement, according to the Legislature, ensures "that the doctor can express how he knowingly is making sure, or in his heart he is not knowingly performing an abortion due to sex selection or race selection." (ER 047:16-20.) But the Legislature also stated that it is "not asking [physicians] to find out, investigate [the reason for the abortion]. We just want them to make sure it's not based on sex selection or race selection." (ER 049:9-12.) Without explaining what it means for a physician to know "in his heart" that his patient is not seeking a race- or sex-selection abortion without asking the woman, the Legislature essentially invited the public to make assumptions about the "kinds" of women who are likely to have such abortions—Black and API women. (ER 029 ¶¶ 55-57.)

It is difficult to imagine a greater stigmatic injury in fact than being identified by your Legislature—simply because of your racial group—as a person who uses abortion as a deliberate attempt to "de-

select" members of your own race or sex, (ER 023-028 ¶¶ 30-33, 42-49), or who is so weak-minded that you can be manipulated into having a race-selection abortion, (ER 025 ¶¶ 34-37); *cf. Catholic League*, 624 F.3d at 1048 ("It would be outrageous if the government of San Francisco could condemn the religion of its Catholic citizens, yet those citizens could not defend themselves in court against their government's preferment of other religious views."). Burdened with this humiliation and hostility, Plaintiffs have "suffer[ed] a form of personal and unwelcome contact with" a law "that would target [their race] for disfavored treatment." *Awad*, 670 F.3d at 1122 (internal quotation marks omitted). Their government has announced that they are viewed with suspicion, and that they present a threat to "the foundation of [America] and human dignity itself" simply because of their race or national origin. (ER 038:18-19.)

It is thus of no legal consequence that Plaintiffs have not demonstrated that they are likely to be denied an abortion due to the Act. *See supra* Part I.A., *infra* Part II. The denial of equal treatment occurred the moment the Legislature singled out Black and API women for disapproval, and passed the Act based on invidious stereotypes

about these women and their decisions and with the purpose of monitoring those decisions. *See Catholic League*, 624 F.3d at 1052 ("The cause of the plaintiffs' injury here is not speculative: it is the resolution itself."); *Cleveland Heights*, 760 F.2d at 722 ("Regardless of the City's status quo position that Smith himself may remain because he is within the desired percentage of black residents, as a black man Smith immutably shares whatever perceived insult or indignity the City's policies pass on to black home buyers in Cleveland Heights.").

Real, cognizable injuries flow from having a government that adopts, endorses, and enshrines into law invidious and offensive racial stereotypes. Plaintiffs have thus demonstrated in the well-pled allegations of their Complaint that they have suffered injury in fact sufficient to confer standing under Article III.

## II. THE DISTRICT COURT IGNORED LONGSTANDING PRECEDENT RECOGNIZING THAT MEMBERS OF TARGETED RACIAL GROUPS MAY CHALLENGE A LAW BASED ON DISCRIMINATORY INTENT.

As noted *supra* in Part I.B., the District Court also appeared to dismiss the case for lack of standing because Plaintiffs did not allege what the District Court considered to be any discriminatory *effect*. (ER 008.) Yet because it is axiomatic that the government cannot act "with

an intent or purpose to discriminate against the plaintiff based upon membership in a protected class," *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (citations omitted), and because Plaintiffs alleged that the Legislature did exactly that, they have standing.

First, as explained *supra* in Part I, the Act has the discriminatory and legally cognizable effect of stigmatizing Black and API women in Arizona who have sought and may seek abortions. Second, the implementation of the law undoubtedly has another effect: to subject women seeking abortions to increased scrutiny and to document that increased scrutiny in an affidavit that becomes part of a woman's medical file. (ER 022-023 ¶¶ 24, 25.) It is irrelevant that the Act's affidavit requirement is facially neutral; or that, in practice, it is applied to women of all races. Plaintiffs "seeking to establish a violation of equal protection by intentional discrimination . . . . [need not] show . . . the existence of better treated, similarly situated persons of a different race." *Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir. 2001).[11]

[11] *See also Farm Labor Org. Comm. v. Ohio State Highway Patrol*, 308 F.3d 523, 534 n.4 (6th Cir. 2002) (noting that although plaintiffs had not alleged that defendants employed racially motivated decision making, "[i]f such a showing could be made, the plaintiffs would not need to establish the existence of a similarly situated class that was not

Rather, it is enough that Plaintiffs alleged—supported by evidence from the Act's legislative history—that the Legislature passed the Act with the intent to monitor the reasons Black and API women may decide to end a pregnancy.[12] This violates Equal Protection and Plaintiffs' members—the targets of this discrimination—have standing to challenge this law. *Cf. Hunter v. Underwood*, 471 U.S. 222 (1985) (law disenfranchising all voters convicted of crimes "involving moral turpitude," which was passed with racially discriminatory intent against Black voters, violated Equal Protection even though it also

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investigated") (citing *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000), *cert denied*, 534 U.S. 816 (2001)).

[12] *See Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977) ("The legislative or administrative history may be highly relevant [to proving an Equal Protection claim], especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."); *see also Oyama*, 332 U.S. at 650-51 ("Reference is made to the fact that nowhere in the statute is there a single mention of race, color, creed or place of birth or allegiance as a determinant of who may not own or hold farm land . . . However, an examination of the circumstances surrounding the original enactment of this law . . . reveals quite a different story.") (Murphy, J., concurring); *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1551-52 (11th Cir.1987) (citing single speech by law's sponsor as evidence that law intentionally discriminated on basis of race); *cf. Yick Wo v. Hopkins*, 6 S. Ct. 1064, 1068 (1886) ("Can a court be blind to what must be necessarily known to every intelligent person in the state?").

disenfranchised white voters convicted of such crimes); *Griffin v. Prince Edward Cnty. Sch. Bd.*, 377 U.S. 218 (1964) (striking facially neutral law closing all public schools because intent was to avoid court-ordered desegregation); *Arlington Heights*, 429 U.S. at 563-64 (a law passed with an "invidious discriminatory purpose" violates Equal Protection).[13]

Put another way, had the Arizona Legislature passed a law requiring doctors to execute the affidavit for only their Black and API abortion patients, Plaintiffs' standing would be beyond question. But because Plaintiffs alleged that the Legislature's *intent* was no less invidious in passing the facially neutral Act, their standing is likewise clear. It cannot be disputed, and must be taken as true, that absent the Legislature's discriminatory intent toward Black and API women described in the Complaint, these persons would not have been targeted for monitoring and subjected to the law's affidavit requirement. It is

[13] Plaintiffs do not concede that the Act is entirely race-neutral: by definition, an abortion law addressing the race of an embryo or fetus automatically categorizes abortion patients on the basis of the race of the pregnant woman (or the race of her sexual partners). Because the Act is aimed at preventing "a mother [who] does not want a . . . minority baby," (ER 023-024 ¶ 30), from using abortion to "de-select" members of her own race, it is necessarily concerned with the race of the woman and thus cannot be race-neutral.

thus of no legal consequence that in the end, other women were also subjected to these burdens, or that the Act, as written, is facially neutral with respect to race. *See, e.g.*, *Hunter*, 471 U.S. at 232 ("[A]n additional purpose to discriminate against poor whites would not render nugatory the purpose to discriminate against all blacks, and it is beyond peradventure that the latter was a 'but-for' motivation for the enactment of [the law].").

Second, it is irrelevant that Plaintiffs failed to "assert that their members have been or will be denied abortions or other medical care." (ER 008.) The fact that the Act has not prevented a single abortion in no way negates Plaintiffs' allegation that the Legislature acted with discriminatory intent, which gives them standing. *Cf. Shaw*, 509 U.S. at 650; *Powers*, 499 U.S. at 411. Indeed, if the reason the Act has prevented no Black and API women from obtaining abortion care is that they do not in fact seek race- and sex-selection abortions, that does not deprive them of the right to challenge their government's action basing legislation on the stereotype that Black and API women do seek such abortions. An Equal Protection plaintiff's standing to challenge a law based on racial stereotypes is not extinguished simply because

those stereotypes are so baseless that she will never act in conformance with them.

As explained *supra* in Part I.C, Plaintiffs' Complaint is replete with allegations that the Legislature was motivated almost exclusively by a desire to monitor the reasons Black and API women in Arizona have abortions, which is more than sufficient to demonstrate at this early stage in the litigation that they have standing to assert their Equal Protection claim. (*See, e.g.*, ER 023-028 ¶¶ 26-51); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2007) (holding that a well-pled complaint must include only "enough fact to raise a reasonable expectation that discovery will reveal evidence" necessary to support the claim).

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the Order and Judgment of the District Court, (ER 001-013), and remand the case back to the District Court for further adjudication.

DATED: March 12, 2014

Respectfully submitted,

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## STATEMENT OF RELATED CASES

Plaintiffs-Appellants are not aware of any related cases in this Court.

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) I certify the following:

This brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B) because it contains 9,861 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

DATED: March 12, 2014

/s/ Alexa Kolbi-Molinas
ALEXA KOLBI-MOLINAS

## CERTIFICATE OF SERVICE

I hereby certify that on March 12, 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/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have sent the foregoing documents by UPS Overnight Delivery to the following non-CM/ECF participants:

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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: March 12, 2014

/s/ Alexa Kolbi-Molinas
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