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HOUSE OF REPRESENTATIVES
REPORT
112–496

PRENATAL NONDISCRIMINATION ACT (PRENDA) OF 2012

MAY 29, 2012.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. SMITH of Texas, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3541]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3541) to prohibit discrimination against the unborn on the basis of sex or race, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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19–006

The Amendment

The amendment is as follows:
Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Prenatal Nondiscrimination Act (PRENDA) of 2012".

SEC. 2. FINDINGS AND CONSTITUTIONAL AUTHORITY.

(a) FINDINGS.—The Congress makes the following findings:

(1) SEX DISCRIMINATION FINDINGS.—

(A) Women are a vital part of American society and culture and possess the same fundamental human rights and civil rights as men.

(B) United States law prohibits the dissimilar treatment of males and females who are similarly situated and prohibits sex discrimination in various contexts, including the provision of employment, education, housing, health insurance coverage, and athletics.

(C) Sex is an immutable characteristic ascertainable at the earliest stages of human development through existing medical technology and procedures commonly in use, including maternal-fetal bloodstream DNA sampling, amniocentesis, chorionic villus sampling or "CVS", and obstetric ultrasound. In addition to medically assisted sex-determination, a growing sex-determination niche industry has developed and is marketing low-cost commercial products, widely advertised and available, that aid in the sex determination of an unborn child without the aid of medical professionals. Experts have demonstrated that the sex-selection industry is on the rise and predict that it will continue to be a growing trend in the United States. Sex determination is always a necessary step to the procurement of a sex-selection abortion.

(D) A "sex-selection abortion" is an abortion undertaken for purposes of eliminating an unborn child of an undesired sex. Sex-selection abortion is barbaric, and described by scholars and civil rights advocates as an act of sex-based or gender-based violence, predicated on sex discrimination. Sex-selection abortions are typically late-term abortions performed in the 2nd or 3rd trimester of pregnancy, after the unborn child has developed sufficiently to feel pain. Substantial medical evidence proves that an unborn child can experience pain at 20 weeks after conception, and perhaps substantially earlier. By definition, sex-selection abortions do not implicate the health of the mother of the unborn, but instead are elective procedures motivated by sex or gender bias.

(E) The targeted victims of sex-selection abortions performed in the United States and worldwide are overwhelmingly female. The selective abortion of females is female infanticide, the intentional killing of unborn females, due to the preference for male offspring or "son preference". Son preference is reinforced by the low value associated, by some segments of the world community, with female offspring. Those segments tend to regard female offspring as financial burdens to a family over their lifetime due to their perceived inability to earn or provide financially for the family unit as can a male. In addition, due to social and legal convention, female offspring are less likely to carry on the family name. "Son preference" is one of the most evident manifestations of sex or gender discrimination in any society, undermining female equality, and fueling the elimination of females' right to exist in instances of sex-selection abortion.

(F) Sex-selection abortions are not expressly prohibited by United States law or the laws of 47 States. Sex-selection abortions are performed in the United States. In a March 2008 report published in the Proceedings of the National Academy of Sciences, Columbia University economists Douglas Almond and Lena Edlund examined the sex ratio of United States-born children and found "evidence of sex selection, most likely at the prenatal stage". The data revealed obvious "son preference" in the form of unnatural sex-ratio imbalances within certain segments of the United States population, primarily those segments tracing their ethnic or cultural origins to countries where sex-selection abortion is prevalent. The evidence strongly suggests that some Americans are exercising sex-selection abortion practices within the United States consistent with discriminatory practices common to their country of origin, or the country to which they trace their ancestry. While sex-selection abortions are more common outside the United

States, the evidence reveals that female feticide is also occurring in the United States.

(G) The American public supports a prohibition of sex-selection abortion. In a March 2006 Zogby International poll, 86 percent of Americans agreed that sex-selection abortion should be illegal, yet only 3 States proscribe sex-selection abortion.

(H) Despite the failure of the United States to proscribe sex-selection abortion, the United States Congress has expressed repeatedly, through Congressional resolution, strong condemnation of policies promoting sex-selection abortion in the "Communist Government of China". Likewise, at the 2007 United Nation's Annual Meeting of the Commission on the Status of Women, 51st Session, the United States delegation spearheaded a resolution calling on countries to condemn sex-selective abortion, a policy directly contradictory to the permissiveness of current United States law, which places no restriction on the practice of sex-selection abortion. The United Nations Commission on the Status of Women has urged governments of all nations "to take necessary measures to prevent . . . prenatal sex selection".

(I) A 1990 report by Harvard University economist Amartya Sen, estimated that more than 100 million women were "demographically missing" from the world as early as 1990 due to sexist practices, including sex-selection abortion. Many experts believe sex-selection abortion is the primary cause. Current estimates of women missing from the world range in the hundreds of millions.

(J) Countries with longstanding experience with sex-selection abortion—such as the Republic of India, the United Kingdom, and the People's Republic of China—have enacted restrictions on sex-selection, and have steadily continued to strengthen prohibitions and penalties. The United States, by contrast, has no law in place to restrict sex-selection abortion, establishing the United States as affording less protection from sex-based feticide than the Republic of India or the People's Republic of China, whose recent practices of sex-selection abortion were vehemently and repeatedly condemned by United States congressional resolutions and by the United States Ambassador to the Commission on the Status of Women. Public statements from within the medical community reveal that citizens of other countries come to the United States for sex-selection procedures that would be criminal in their country of origin. Because the United States permits abortion on the basis of sex, the United States may effectively function as a "safe haven" for those who seek to have American physicians do what would otherwise be criminal in their home countries—a sex-selection abortion, most likely late-term.

(K) The American medical community opposes sex-selection. The American Congress of Obstetricians and Gynecologists, commonly known as "ACOG," stated in its 2007 Ethics Committee Opinion, Number 360, that sex-selection is inappropriate because it "ultimately supports sexist practices." The American Society of Reproductive Medicine (commonly known as "ASRM") 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 offspring (i.e., by placing on them expectations that are too high),". . . and "reinforcement of gender bias in society as a whole." Embryo sex-selection, ASRM notes, remains "vulnerable to the judgment that no matter what its basis, [the method] identifies gender as a reason to value one person over another, and it supports socially constructed stereotypes of what gender means." In doing so, it not only "reinforces possibilities of unfair discrimination, but may trivialize human reproduction by making it depend on the selection of nonessential features of offspring." The ASRM ethics opinion continues, "ongoing problems with the status of women in the United States make it necessary to take account of concerns for the impact of sex-selection on goals of gender equality." The American Association of Pro-Life Obstetricians and Gynecologists, an organization with hundreds of members - many of whom are former abortionists - makes the following declaration: "Sex selection abortions are more graphic examples of the damage that abortion inflicts on women. In addition to increasing premature labor in subsequent pregnancies, increasing suicide and major depression, and increasing the risk of breast cancer in teens who abort their first pregnancy and delay childbearing, sex selection abortions are often targeted at fetuses simply because the fetus is female. As physicians who care for both the mother and her unborn child, the American Association of Pro-Life Obstetricians and Gynecologists vigorously opposes aborting fetuses because of their gender."

The President's Council on Bioethics published a Working Paper stating the council's belief that society's respect for reproductive freedom does not prohibit the regulation or prohibition of "sex control," defined as the use of various medical technologies to choose the sex of one's child. The publication expresses concern that "sex control might lead to . . .dehumanization and a new eugenics."

(L) Sex-selection abortion results in an unnatural sex-ratio imbalance. An unnatural sex-ratio imbalance is undesirable, due to the inability of the numerically predominant sex to find mates. Experts worldwide document that a significant sex-ratio imbalance in which males numerically predominate can be a cause of increased violence and militancy within a society. Likewise, an unnatural sex-ratio imbalance gives rise to the commoditization of humans in the form of human trafficking, and a consequent increase in kidnapping and other violent crime.

(M) Sex-selection abortions have the effect of diminishing the representation of women in the American population, and therefore, the American electorate.

(N) Sex-selection abortion reinforces sex discrimination and has no place in a civilized society.

(2) RACIAL DISCRIMINATION FINDINGS.—

(A) Minorities are a vital part of American society and culture and possess the same fundamental human rights and civil rights as the majority.

(B) United States law prohibits the dissimilar treatment of persons of different races who are similarly situated. United States law prohibits discrimination on the basis of race in various contexts, including the provision of employment, education, housing, health insurance coverage, and athletics.

(C) A "race-selection abortion" is an abortion performed for purposes of eliminating an unborn child because the child or a parent of the child is of an undesired race. Race-selection abortion is barbaric, and described by civil rights advocates as an act of race-based violence, predicated on race discrimination. By definition, race-selection abortions do not implicate the health of mother of the unborn, but instead are elective procedures motivated by race bias.

(D) Only one State, Arizona, has enacted law to proscribe the performance of race-selection abortions.

(E) Race-selection abortions have the effect of diminishing the number of minorities in the American population and therefore, the American electorate.

(F) Race-selection abortion reinforces racial discrimination and has no place in a civilized society.

(3) GENERAL FINDINGS.—

(A) The history of the United States includes examples of both sex discrimination and race discrimination. The people of the United States ultimately responded in the strongest possible legal terms by enacting constitutional amendments correcting elements of such discrimination. Women, once subjected to sex discrimination that denied them the right to vote, now have suffrage guaranteed by the 19th amendment. African-Americans, once subjected to race discrimination through slavery that denied them equal protection of the laws, now have that right guaranteed by the 14th amendment. The elimination of discriminatory practices has been and is among the highest priorities and greatest achievements of American history.

(B) Implicitly approving the discriminatory practices of sex-selection abortion and race-selection abortion by choosing not to prohibit them will reinforce these inherently discriminatory practices, and evidence a failure to protect a segment of certain unborn Americans because those unborn are of a sex or racial makeup that is disfavored. Sex-selection and race-selection abortions trivialize the value of the unborn on the basis of sex or race, reinforcing sex and race discrimination, and coarsening society to the humanity of all vulnerable and innocent human life, making it increasingly difficult to protect such life. Thus, Congress has a compelling interest in acting—indeed it must act—to prohibit sex-selection abortion and race-selection abortion.

(b) CONSTITUTIONAL AUTHORITY.—In accordance with the above findings, Congress enacts the following pursuant to Congress' power under—

(1) the Commerce Clause;

(2) section 2 of the 13th amendment;

(3) section 5 of the 14th amendment, including the power to enforce the prohibition on government action denying equal protection of the laws; and

(4) section 8 of article I to make all laws necessary and proper for the carrying into execution of powers vested by the Constitution in the Government of the United States.

SEC. 3. DISCRIMINATION AGAINST THE UNBORN ON THE BASIS OF RACE OR SEX.

(a) IN GENERAL.—Chapter 13 of title 18, United States Code, is amended by adding at the end the following:

"§ 250. Discrimination against the unborn on the basis of race or sex

"(a) IN GENERAL.—Whoever knowingly—

"(1) performs an abortion knowing that such abortion is sought based on the sex, gender, color 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 funds for the performance of a sex-selection abortion or a race-selection abortion; or

"(4) transports a woman into the United States or across a State line for the purpose of obtaining a sex-selection abortion or race-selection abortion;

or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.

"(b) CIVIL REMEDIES.—

"(1) CIVIL ACTION BY WOMAN ON WHOM ABORTION IS PERFORMED.—A woman upon whom an abortion has been performed pursuant to a violation of subsection (a)(2) may in a civil action against any person who engaged in a violation of subsection (a) obtain appropriate relief.

"(2) CIVIL ACTION BY RELATIVES.—The father of an unborn child who is the subject of an abortion performed or attempted in violation of subsection (a), or a maternal grandparent of the unborn child if the pregnant woman is an unemancipated minor, may in a civil action against any person who engaged in the violation, obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

"(3) APPROPRIATE RELIEF.—Appropriate relief in a civil action under this subsection includes—

"(A) objectively verifiable money damages for all injuries, psychological and physical, including loss of companionship and support, occasioned by the violation of this section; and

"(B) punitive damages.

"(4) INJUNCTIVE RELIEF.—

"(A) IN GENERAL.—A qualified plaintiff may in a civil action obtain injunctive relief to prevent an abortion provider from performing or attempting further abortions in violation of this section.

"(B) DEFINITION.—In this paragraph the term 'qualified plaintiff' means—

"(i) a woman upon whom an abortion is performed or attempted in violation of this section;

"(ii) any person who is the spouse or parent of a woman upon whom an abortion is performed in violation of this section; or

"(iii) the Attorney General.

"(5) ATTORNEYS FEES FOR PLAINTIFF.—The court shall award a reasonable attorney's fee as part of the costs to a prevailing plaintiff in a civil action under this subsection.

"(c) LOSS OF FEDERAL FUNDING.—A violation of subsection (a) shall be deemed for the purposes of title VI of the Civil Rights Act of 1964 to be discrimination prohibited by section 601 of that Act.

"(d) REPORTING REQUIREMENT.—A physician, physician's assistant, nurse, counselor, or other medical or mental health professional shall report known or suspected violations of any of this section to appropriate law enforcement authorities. Whoever violates this requirement shall be fined under this title or imprisoned not more than 1 year, or both.

"(e) EXPEDITED CONSIDERATION.—It shall be the duty of the United States district courts, United States courts of appeal, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this section.

"(f) EXCEPTION.—A woman upon whom a sex-selection or race-selection abortion is performed may not be prosecuted or held civilly liable for any violation of this section, or for a conspiracy to violate this section.

"(g) PROTECTION OF PRIVACY IN COURT PROCEEDINGS.—

"(1) IN GENERAL.—Except to the extent the Constitution or other similarly compelling reason requires, in every civil or criminal action under this section, the court shall make such orders as are necessary to protect the anonymity of any woman upon whom an abortion has been performed or attempted if she

does not give her written consent to such disclosure. Such orders may be made upon motion, but shall be made sua sponte if not otherwise sought by a party.

"(2) ORDERS TO PARTIES, WITNESSES, AND COUNSEL.—The court shall issue appropriate orders under paragraph (1) to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman must be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists.

"(3) PSEUDONYM REQUIRED.—In the absence of written consent of the woman upon whom an abortion has been performed or attempted, any party, other than a public official, who brings an action under this section shall do so under a pseudonym.

"(4) LIMITATION.—This subsection shall not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

"(h) DEFINITION.—The term 'abortion' means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman, with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child, unless the act is done with the intent to—

"(1) save the life or preserve the health of the unborn child;

"(2) remove a dead unborn child caused by spontaneous abortion; or

"(3) remove an ectopic pregnancy.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 13 of title 18, United States Code, is amended by adding after the item relating to section 249 the following new item:

"250. Discrimination against the unborn on the basis of race or sex.".

SEC. 4. SEVERABILITY.

If any portion of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect the portions or applications of this Act which can be given effect without the invalid portion or application.

Purpose and Summary

H.R. 3541, the "Prenatal Nondiscrimination Act (PRENDA) of 2012," bans the performance of a sex-selection or race-selection abortion, coercion to undergo either, the acceptance or solicitation of funds for either, and the transportation of a woman into the United States or across state lines to obtain either.[1] Persons violating the law would be subject to fines or a maximum of 5 years of imprisonment, or both, and a civil cause of action for damages.[2] The bill's findings provide that the proscribed abortions are purely elective procedures sought for discriminatory purposes that do not implicate the health of the mother.[3]

Background and Need for the Legislation

Over the past decade, evidence has come to light suggesting that abortion has become a tool of sex and race discrimination in America, for both individuals and government funded entities. H.R. 3541 provides that no one may discriminate against an unborn child by knowingly subjecting that child to an abortion on the basis of sex or race.

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[1] H.R. 3541, 112th Cong. § 250(a)-(d) (2011).
[2] *Id.* § 250(a).
[3] *Id.* § 2(a)(1)(D); § 2(a)(2)(C).

SEX-SELECTION ABORTION

Sex-selection abortion is defined in the findings of H.R. 3541 as "an abortion undertaken for the purpose of eliminating a child of an undesired sex." While sex-selection can be achieved outside the abortion context through sperm sorting and embryo selection, these techniques are not widely available or affordable, and make up a small fraction of sex-selection procedures.[4] Most sex-selection takes the form of abortion.[5]

The revelation that hundreds of millions of girls are "missing" due to sex-selection and other deadly discriminatory practices came to light when Nobel Prize winner Amartya Sen penned his famous article for the *The New York Review of Books* documenting that approximately 100 million women were demographically absent from the world as early as 1990.[6] Because of scant reporting in the third world, the full extent of this problem is unknown. Current estimates are that approximately 200 million women and girls are "demographically missing" from the world due to sex-selection abortion, female infanticide, and other practices that lead to infant or early childhood mortality among baby girls.[7]

Sex-selection abortion is a form of violence against women and girls (the mother and the unborn child).[8] Sex-selection abortion is most common in parts of the world where dowries, bride burnings, widow immolations, the killing of newborn girls by dais,[9] forced abortions, trafficking, and other uncommonly savage offenses against females are most common.[10] But it is also a tragedy that it occurs in the United States.

In most industrialized countries, sex-selection generally is banned or restricted. The United States is the notable exception.[11]

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[4] Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data,* American Journal of Applied Economics, vol. 1, no. 2, p. 5, *available at* http://www.aeaweb.org/articles.php?doi=10.1257/app.1.2.1

[5] *Id.*

[6] Amartya Sen, *More Than 100 Million Women Are Missing,* The New York Review of Books, Vol. 37, No. 20, (December 20, 1990), *available at* http://www.nybooks.com/articles/3408 (last visited July 18, 2008).

[7] 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.

[8] Sunita Puri, Department of Internal Medicine, University of California, San Francisco; Vincanne Adams, Department of Anthropology, History, and Social Medicine, University of California, San Francisco; Susan Ivey, Department of Community Health and Human Development, University of California, Berkeley; Robert D. Nachtigall, Department of Obstetrics, Gynecology, and Reproductive Sciences, University of California, San Francisco, "*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 & Medicine, Volume 72, Issue 7, April 2011, Pages 1169–1176.

[9] Carla Power, *NS Special Report: But What if it's a Girl?,* The New Statesman, April 24, 2006. A dais is a traditional midwife, typically in the Asian subcontinent, who delivers babies and who, not infrequently, is hired to kill live, newborn baby girls.

[10] Nicholas Eberstadt, *Global War Against Baby Girls,* The New Atlantis; A Journal of Technology and Science (Fall 2011) *available at* http://www.aei.org/files/2012/01/12/-the-global-war-against-baby-girls__094915483477.pdf

[11] Council of Europe, Parliamentary Assembly, *Sex-Selective Abortion—Gendercide,* Doc. 12258, (May 11, 2010) available at http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12258.pdf (finding that "gender imbalance constitutes a serious threat to global security," and calling on member states to "condemn sex-selection abortion" and to adopt legislative measures "to restrict the use of prenatal diagnostics strictly to identify medical conditions" binding the signatories: Italy, the U.K., Spain, Austria, Ireland, Serbia, Estonia, Moldova, Bulgaria, Liechtenstein, and Lithuania). (Sex selection techniques are banned or restricted by India, China, the United Kingdom, Australia, and many European countries. Indian Medical Termination of Pregnancy Act, 1971 ("MTPN Act"), as amended in 2002, and The Pre-Natal Diagnostic

Continued

U.S. census data and national vital statistics show some Americans are employing sex-selection techniques in their reproductive decisions.[12] Certain communities within the United States are achieving sex ratios that are unnatural and statistically impossible without medical intervention. These unnatural sex ratios strongly favor the birth of males over females.[13] Reproductive rights groups maintain that immigrant communities bring the sex-biases of their native land with them when they immigrate.[14]

The American native-born population also harbors attitudes favoring son preference. In one study, twenty-five percent of American couples claimed that they would consider utilizing a pre-implantation (non-abortive) sex selection technique; Males would fare far better than unborn females, with "81 percent of men and 94 percent of women admitting that they would desire their first child to be a boy." [15]

The natural ratio of male to female births is 1.05:1.[16] In April 2008, two economists from Columbia University demonstrated through Census 2000 data that unnatural sex ratios exist for births in Asian-American communities. For example, among Indian-American families whose first two children are daughters, the male to female sex ratio for third children is 1.51:1 (compared with the natural ratio of 1.05:1). Restated, boys outnumber girls by 50% among third children born in America to Indian-American parents. This ratio is not possible as a natural outcome.

The economists concluded that the sex-ratio imbalance is the result of "sex-selection, most likely at the prenatal stage," meaning most likely due to sex-selection abortion.[17] Given the years examined in the 2000 U.S. Census (1990–2000), there is no other likely explanation. The only two alternative sex-selection techniques that

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Techniques (Regulation and Prevention of Misuse) Act (1994) ("PNDT Act"), No. 57, as amended in 2002 by the Pre-Natal Diagnostic Techniques Act (Regulation and Prevention of Misuse Act), No. 14 ; Mother and Child Heath Law of the People's Republic of China (1994); Population and Family Planning Law of the People's Republic of China (2002); *see also* Regulation on Prohibiting Fetal Sex Identification and Selective Termination of Pregnancy for Non-medical Reasons, adopted at Fifth Session of the Ninth Standing Committee of Shandong Provincial People's Congress (November 21, 1998); The Abortion Act of 1967, c. 87, sec. 7 (United Kingdom); Australian National Health and Medical Research Council Act 1992, No. 225/1990; Sex-selection by pre-implantation genetic diagnosis is forbidden by law in India, South Australia, Canada, the United Kingdom, and ten other European countries. Canadian Assisted Human Reproduction Act, (2004), S.C. chapter 2, s. 5(e)). Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: ch.4, art. 14, (Oviedo, 4.IV.1997)("The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided") binding signatories that have ratified the document, including Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Georgia, Greece, Hungary, Iceland, Latvia, Lithuania, Montenegro, Norway, Portugal, Republic of Moldova, Romania, San Marino, Serbia, Slovakia, Slovenia, Spain, Switzerland, the former Yugoslav Republic of Macedonia, and Turkey, http://conventions.coe.int/Treaty/EN/Treaties/Html/164.htm, list of signatories and ratification dates available at http://treaties.un.org/pages/showDetails.aspx?objid=080000028008c3a6 ; *Taking a Stand: Tools for Action on Sex-Selection,* a collaborative project of the Generations Ahead, National Asian Pacific American Women's Forum (NAPAWF), and Asian Communities for Reproductive Justice, p. 4, available at http://napawf.org/wp-content/uploads/2010/01/Toolkit-final.pdf.

[12] Abrevaya, *supra* note 4, at 2–5.

[13] Douglas Almond and 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 (April 2008).

[14] Sujatha Jesudason, Miriam Yeung & Eveline Shen, *Taking a stand, tools for action on sex-selection,* Generations Ahead, National Asian Pacific American Women's Forum (NAPAWF), and Asian Communities For Reproductive Justice (ACRJ), (Accessed May 7, 2012), Page 12, http://napawf.org/wp-content/uploads/2010/01/Toolkit-final.pdf.

[15] Jason Roberts, *Customizing Conception: A Survey of Preimplantation Genetic Diagnosis and the Resulting Social, Ethical, and Legal Dilemmas,* DUKE L. & TECH. REV., 0012, 26. (2002).

[16] *Id.*

[17] *Id.*

could produce the sex imbalance—sperm sorting and embryonic stage sex-selection (also called Preimplantation Genetic Diagnosis or "PGD")—were not widely available at that time.[18] Further, the cost of non-abortive sex-selection techniques is prohibitive for many couples.[19]

American physicians admit that sex-selection is a reality in the United States. Dr. Norbert Gleicher, medical director of the Center for Human Reproduction, a fertility and sex-selection clinic with offices in New York and Chicago, concedes that Americans of Asian and Middle Eastern descent prefer males.[20] A 1989 study of sex-selection in New York City, conducted by Dr. Masood Khatamee, clinical professor at New York University Medical Center, found that *all* the foreign-born couples surveyed—mostly from Asia and the Middle East—preferred boys, predominantly for cultural and economic reasons. Often, the pressure to sex-select is applied by the husband's parents.[21]

Some physicians are working to discourage sex-selection in the United States. Dr. Lisa Eng, a Hong Kong-born gynecologist who practices in New York's Chinatown actively discourages couples who prefer boys from opting for sex-selection abortions. But, she said, "If it's going to be a third [child], they're pretty determined to have a boy. If it's a boy, they keep it. If it's a girl, they'll abort."[22]

SEX-SELECTION MAY BE MORE PRONOUNCED IN SUB-COMMUNITIES IN THE UNITED STATES THAN IN ASIA

Sex-selection practices do not subside in a Western environment where girls are valued equally; Sex-selection in American immigrant communities can be more pronounced than in those communities' countries of origin. Professor Jason Abrevaya, an economist at the University of Texas, surveyed census and birth records through 2004 to compare the sex ratio of males to females at birth among Chinese immigrant families. Abrevaya discovered that the unnatural sex-ratio favoring boys among immigrant Chinese parents in New York was higher than the national average for Chinese families living in mainland China, where boys typically account for about 515 boys of every 1,000 births. Specifically, among Chinese New Yorkers having a third child, the number of boys was an astounding 558 boys per 1000 births.[23] In California, the sex ratio among ethnic Chinese in Santa Clara County has been as low as 784 girls per one thousand male births, and statewide, the ratio among Asians in urban counties ranges between 888 and 927 girls, per 1000 male births.[24]

Experts speculate that this exacerbation of the problem is supported by the Western world's greater access to healthcare that includes sex-determination tests (ultrasound, CVS, and

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[18] Abrevaya, *supra* note 4, at 5.
[19] *Id.*
[20] Sam Roberts, *U.S. Births Hint at Bias for Boys in Some Asians,* New York Times, June 14, 2009.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] G. Sharat Lin, PhD., Advanced Imaging Associates of Fremont, CA, Presentation before the American Institute of Ultrasound in Medicine (AIUM), San Diego, CA (March 2010).

amniocentesis).[25] This theory received support from a study of Indian-American women who have undergone sex-selection abortions in the United States; participants reported that the ready availability and legality of ultrasound technology in the U.S. increased the pressure and even "obligation" to use the technology to seek out and destroy unborn girls.[26]

Professor Abrevaya's review of census and birth records showed that *Americans have sex-selected thousands of baby girls.*[27]

NOT ALL SEX-SELECTION IS ABORTION; BUT MOST OF IT IS

Children are being commoditized by sex-selection abortion practices. The desired "product" is nearly always a son. While it is true that sons could be intentionally procured by methods other than aborting unwanted females, abortion is likely to be the method of choice because it is the least expensive—by a large margin. With sex-selection techniques turning unborn children into products available in the marketplace, the laws of supply and demand come into play. If a given sex-selection technique offers a son for a fraction of the cost of a different sex-selection technique, one may expect that the demand for the product at the lower "price" will far exceed the demand for the product at the higher price.

Sex-selection abortion is the most economical choice of the three methods, costing only a small fraction (between $300 and $3,000, depending on the trimester) of what the other two methods would cost (approximately $10,000 for sperm sorting[28] and between $54,000 and $108,000 on average for PGD, using an average cost of $18,000 *per implantation cycle* for PGD).[29]

Furthermore, sperm sorting and PGD have a lackluster success rate. Sperm sorting only succeeds 70–80% of the time, meaning that a child of the undesired sex is inadvertently produced through the technique.[30] PGD is often completely unsuccessful, with all implanted embryos failing to thrive after an $18,000 implantation cycle. The American Congress of Obstetricians and Gynecologists ("ACOG") has published a public statement that "[n]o current technique for *pre-fertilization* sex selection [sperm sorting] has been shown to be reliable."[31] Therefore, where the "product" desired is a son, the rational choice is to conceive for free and then to abort females repeatedly for a small price until a son is "achieved," rath-

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[25] Abrevaya, *supra* note 4, at 3.
[26] Puri, *supra* note 8, at 1175.
[27] Abrevaya. *supra* note 4, at 27.
[28] Rajani Bhatia et al., *Sex Selection: New Technologies, New Forms of Gender Discrimination,* CTR. GENETICS & SOC'Y (Oct. 2003), *available at* http://genetics-and-society.org/resources/background/factsheet.html .
[29] Patti Neighmond, Study: *Sixth Time May Be Charm For In Vitro, "Day to Day",* National Public Radio, http://www.npr.org/templates/story/story.php?storyId=99654924, January 21, 2009. (PGD must be followed by an in vitro fertilization procedure (each in vitro fertilization is known as an implantation cycle) and often multiple cycles must be performed before a successful implantation and successful live birth results. For example, one study reported a 45% to 53% live birth rate after three implantation cycles, and a success rate of between 51% and 71% after six implantation cycles. A sex-selection using this method would only have a 50% chance of success only after 3—6 implantation cycles, meaning that the production of the sex-selected child could cost between $54,000.00 and $108,000.00 ($18,000.00 average cost of an implantation cycle times 3 or 6)).
[30] Microsort, an American company offering sperm sorting, claims a success rate of 85% for couples who desire a boy. http://www.microsort.net.
[31] Center for Reproductive Rights, *Statement of Policies and Principles on Discrimination Against Women and Sex-Selective Abortion Bans,* Sep. 29, 2009, *available at* http://reproductiverights.org/en/document/statement-of-policies-and-principles-on-discrimination-against-women-and-sex-selective-abortion.

er than pay potentially tens of thousands of dollars for a procedure that has a significant failure rate.[32]

This calculation is currently perfectly legal; the United States is one of very few industrialized nations that do not restrict the various methods of sex-selection—despite our continuous condemnation of other countries that permit the practice.[33] The states are little better, with only three states having passed sex-selection abortion prohibitions: Illinois, Pennsylvania, and Arizona.[34]

Sex-selection is on the rise and has given birth to a growing niche industry.[35] Demographers believe there exists a "growing tendency for American families to embrace sex-selection techniques, like in vitro fertilization and sperm sorting, or abortion."[36]

Sex-selection abortion is made easier (and less expensive) by emerging, over-the-counter products that promise to reveal the sex of an unborn child as early as 5 weeks after fertilization, meaning that a woman could have a sex-selection abortion in the first trimester rather than the second, reducing medical risks and fees. One product, the *Baby Gender Mentor Home DNA Gender Testing Kit,* sells for less than $300. It claims to be 99.9% accurate as early as *five* weeks after conception, but no scientific evidence is yet available to confirm the claim.[37] The manufacturer of this product has been sued for alleged misrepresentation about its ability to predict the sex of the child.[38] Tellingly, the plaintiffs may well be suing on the basis that they would have aborted their child had the product worked as advertised.[39]

AMERICA AS A CAPITAL OF THE SEX-SELECTION MARKET

America has become a center for the lucrative international sex-selection market that crosses state and international lines.

Women cross the border from Canada to obtain sex-selection abortions in the United States. An editorial in the January 2012 edition of the Canadian Medical Association Journal drafted by Editor-in-Chief, Dr. Rajendra Kale, argues that sex-selection abortion is a serious problem among certain communities in Canada, and that physicians should refrain from revealing the sex of the baby until 30 weeks, the point at which Canada law forbids abortion.[40] In a radio interview with CBC Toronto host, Matt Galloway, Aruna Papp, Canadian counselor with Family Services, York Re-

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[32] Rajani Bhatia et al., *Sex Selection: New Technologies, New Forms of Gender Discrimination,* Ctr. Genetics & Soc'y, Oct. 2003, *available at* http://genetics-and-society.org/resources/background/factsheet.html.

[33] H. Res. 530, 108th Cong. (2004); H. Res. 794, 109th Cong. (2006). (In 2007, the United States unsuccessfully pushed a resolution at the United Nations to condemn sex-selection abortion worldwide.) *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). (Further, the U.S. Congress has passed resolutions condemning the People's Republic of China for its failure to end sex-selection and violence against girls).

[34] IL ST CH 720 § 510/6; 18 Pa. Cons. Stat. Ann. 3204(c) (1994); AZ ST § 13–3603.02 (2011).

[35] Carey Goldberg, *Test Reveals Gender Early in Pregnancy; Ethicists Fear Use in Sex Selection,* Boston Globe, June 27, 2005.

[36] Sam Roberts, *U.S. Births Hint at Bias for Boys in Some Asians,* New York Times, June 14, 2009.

[37] *See* http://www.intelligender.com/intelligender-gender-prediction-test.html.

[38] Karen Kaplan, *Problems Follow Early Reads on Baby's Sex,* Los Angeles Times, March 2, 2008 (reprinted in the China Post).

[39] *Id.*

[40] Dr. Rajendra Kale, *"It's a Girl!"—Could be a Death Sentence,* Canadian Medical Association Journal, NRC Research Press, January 2012, *available at* http://www.cmaj.ca/content/early/2012/01/16/cmaj.120021.

gion, confirms that women in Canada who want sex-selection abortions will go to the United States to get them:

> MG: In the wake of this [Canadian Medical Association] editorial being published yesterday, there has been some dispute as to how common this issue [sex-selection abortion] is in Canada.
>
> AP: It is *very common*! It is *very common*!
>
> MG: What then—.
>
> AP: And nobody is keeping data because the doctors can't keep data. It is so easy to have that kind of ultrasound here in Canada, fly down to India, have an abortion. Go down to Buffalo. Go down to Michigan. Have your abortion and come back.
>
> MG: How often is something like this happening? I mean again that—I think that it strikes a lot of people or it would strike a lot of people very strongly wondering how this—this could exist in Canada now. That perhaps there are other regions of the world where this does happen. But people would say "no, this simply is not happening."
>
> AP: It *is* happening *here*! We are not allowed to keep data. We don't know how many are happening. I can say that in 6 months *so* many women have come. We have agency Punjabi Health Services in Peel region. It is *the top problem* there related to mental illness. In South Asian Settlement Services in Scarborough, for example, the top problem there is related to mental illness, depression, and attempted suicide.
>
> MG: If it is an issue that is prevalent but also taboo because you can't keep statistics and people don't like talking about it, how do you through your agency actually reach out and deal with this issue on the level that people are willing to talk about it?
>
> AP: We can't reach out because we have to wait until they come to us. There is such a backlash from the community and everyone denies it. But it's only the service providers, *the doctors,* who send the clients to us, who can tell you that this is going on. Women can't talk about it publicly. If they do, then there is no place for them to go. They can't go back to their husbands and in-laws and talking about it. But also because they are women who don't want to have more than two or three children themselves, but the pressure comes from the family.
>
> MG: What can you do to tell those women that girls are valued in our society?
>
> AP: We have been working at it the last 30 years. . . . Just service providers like myself talking about it, makes—is not enough . . . the backlash is you're perpetuating racism, you're perpetuating stereotype, negative things about the community. If we own the problem, then *as a community* we can start making the changes from in-

> side. And outside service providers are doing their best . . . ”

Ms. Paap described the fear that an Indian woman feels by virtue of being a female and failing to bear sons in her culture:

> “We had six girls [in my family] and I—. My earliest memories is from when I was 5 years old, my grandmother saying, you know, there are so many girls in this family now and I’m going to have to drop some of you in the well. So I grew up wondering which one of us was going to be dropped in the well that day. So that kind of fear is very common. But also in new brides. Even the first and second generation girls who are born here [Canada] and brought up here *are* under pressure to produce boys. For many of them, they do not want to have two—more than two or three children. And one of them, especially the first one, should be a boy. And by the time they come to us—by the time to the medical doctors, they are suffering from depression. They are suffering from many other physical ailments that are related to two, three, or four abortions.” [41]

While American fertility clinics tend to not overtly advertise sex-selection abortion services, the *New York Times* has reported that sex-selection services target the Indian-American community through Indian-American publications with enticements such as “Boy or Girl? We will tell you,” with at least one of the advertisers strongly hinting at abortion.[42]

The Fertility Research Foundation is another U.S. based organization that offers embryo sex-selection.[43] Until 2001, this company advertised its “family balancing” program in India Abroad Newspaper—a newspaper targeted towards Indian-Americans in the U.S. India Abroad stopped accepting sex-selection clinic ads in 2001 because its new owners, India Ltd., “felt a little queasy . . . ”and didn’t “want to be remotely associated with anybody that discriminates for a boy child over a girl child. It’s wrong to discriminate.” [44]

Dr. Jeffery Steinberg owns the abovementioned New York-based Fertility Institute, which touts itself as “A Leading World Center for 100% PGD Gender Selection.” [45] Dr. Steinberg told the *London Times* that nearly half the people who go to his clinic for pre-implantation genetic diagnosis (PGD, or sex-selection at the embryonic stage) sex-selection are from the U.K., where sex-selection through PGD is now banned.[46]

The American near-monopoly on legal sex-selection has presented Steinberg with a financial windfall, and he states “Britain is far more conservative than it used to be. They were the innovators but now they’ve got handcuffs on . . . [f]rom a business

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[41] *Id.*

[42] Rich Lowry, *The Backwardness of Abortion,* (citing the New York Times), National Review Online, August 23, 2001.

[43] Fertility Institute promotional video, available at http://frfbaby.com/default.aspx and http://www.fertility-docs.com/fertility_gender.phtml.)

[44] Susan Sachs, *Clinics Pitch to Indian Emigrés: It’s a Boy,* The New York Times, Aug. 15, 2001, *available at* http://www.geneticsandsociety.org/article.php?id=118.

[45] The Fertility Institute, *available at* www.fertility-docs.com/fertility_gender.phtml. The Fertility Institute states that they can “virtually guarantee” that one’s child will be the sex of one’s choice.

[46] Steven Ertelt, *New Abortion Center in New York Targets Brits Who Want Sex-Selection Abortions,* (Aug. 24, 2009), http://archive.lifenews.com/state4370.html.

standpoint, it's the best thing going [for American physicians]. From a medical standpoint, it's a travesty."[47]

The Fertility Institute has offices in Los Angeles, New York, and Mexico, complete with an international travel desk that assists individuals across the globe to reach their facilities.[48] Dr. Steinberg states that "Gender selection is a commodity for purchase . . . if you don't like it, don't buy it."[49]

Dr. Steinberg says that his clinics get requests from "every nation on earth" and are "able to accommodate them." "For the first time in the history of mankind," he claims to be able to guarantee the sex of your child. Additionally, Steinberg's clinics advertise as a "haven" for gay couples looking to design a family. This and other advertisements, operating under the permissiveness of U.S. law, demonstrate that the U.S. is poised to become the world capital of sex-selection. While the advertisers are typically not so bold as to offer sex-selection abortion explicitly, the trend lines are clear. As William Saletan asks in *Slate Magazine,* if it's fine to advertise for sex-selection PGD, why not sex-selection abortion?[50]

While the existence and success of Dr. Steinberg's clinics support H.R. 3541's findings that sex-selection is on the rise and international in scope, this type of service remains a luxury in that the *advertised* services are pre-implantation, and therefore, very expensive. The great majority of the market opts for the ultrasound and a grisly late-term abortion (after the first trimester).[51]

THE BRUTALITY OF THE TYPICAL SEX-SELECTION ABORTION

The typical sex-selection abortion is late-term and often violent. This is because the ultrasound is the most common technology used to determine sex, and it is typically employed between the 16th and the 22nd week, post-fertilization.[52] The pregnancy has reached the second trimester, and is approaching the third trimester. Abortions at this stage are complicated, high risk and violent, because the RU–486 pill and dilation and suction are not sufficient to end the life of the unborn child.[53] Late term abortions may be saline abortions (the unborn child is slowly suffocated and burned with the injection of a saline solution into the uterus), lethal injection by chest puncture and delivery abortions, or dismemberment abortions.[54] Prior to the passage of the partial-birth abortion ban, sex-selections may have taken this form as well.[55]

Medical evidence proves that unborn children can feel pain at 20 weeks gestation, if not substantially earlier.[56] In most states there

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[47] *Id.*

[48] *See* http://www.fertility-docs.com/.

[49] Mimi Rohr/Gamma, *Fertility Institutes: The Clinic That Helps Couples To Choose The Sex of Their Babies,* (2006) *available at* www.editorial.fnphoto.com/stories/Texts/2332-text.html. Success rates for in-vitro fertilization ranges from 65%-80% and the center advertises a 99% chance of getting the gender desired for successful implantations. Fertility Institutes charges from $18,000 to $19,000 for each gender selection in-vitro fertilization procedure attempt. Fifty percent of Steinberg's patients come from countries other than the US.

[50] William Saletan, *Sex-Selection: Nobody's Business?* Slate, (June 15, 2009).

[51] Abrevaya, *supra,* note 4 at 5.

[52] *Id.;* My Health News Daily, MSNBC, (Jan. 16, 2012) *available at* http://vitals.msnbc.msn.com/__news/2012/01/16/10168064-keep-babys-sex-secret-to-prevent-gender-based-abortions-doc-says.

[53] *See* http://www.americanpregnancy.org/unplannedpregnancy/abortionprocedures.html.

[54] *Id.*

[55] 18 U.S.C. § 1531 (2003). The Partial Birth Abortion ban became law in 2003, after the conclusion of the various studies that show the occurrence of sex-selection in the United States.

[56] *See* also www.doctorsonfetalpain.org.

is no legal requirement that a physician inform a patient that the unborn can feel pain, nor a legal requirement that a patient pay the added expense of anesthesia for the unborn child (although a few states are considering laws to do so).[57] Therefore, the government's failure to prohibit sex-selection abortions will likely lead to elective, completely unnecessary, painful abortions of healthy baby girls, for no reason other than that they are female.

MEDICAL ASSOCIATIONS OPPOSE SEX-SELECTION, EXCEPT WHEN USED TO ELIMINATE SEX-LINKED DISEASES

Medical associations worldwide oppose sex-selection abortion, except in cases involving sex-linked diseases.[58] The reason for opposing sex-selection is uniform: the desire to combat discrimination.[59] Abortion to eliminate sex-linked diseases does not implicate sex discrimination, therefore medical associations find that sex-selection for this reason is "therapeutic" and permissible. The Programme of Action adopted by the United Nations International Conference on Population and Development urges all nations "to take necessary measures to prevent . . . prenatal sex-selection" except for elimination of sex-linked diseases.[60] Likewise, the International Federation of Gynecology and Obstetrics rejects sex-selection for "non-medical" purposes.[61] Even Paula Franklin, the Medical Director of Marie Stopes International, perhaps the world's largest abortion franchise, states that sex-selection abortions are "not medically appropriate."[62]

American medical associations are mostly in conformity with the opinions of the world bodies. The American College of Obstetrics and Gynecology (ACOG) opposes sex-selection abortion, and other forms of sex-selection, except to eliminate sex-linked diseases.[63] Specifically, ACOG posited ". . . [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."[64] The American Society of Reproductive Medicine opposes sex-selection of embryos for any reason unrelated to sex-linked diseases, on the basis that sex-selection reinforces discriminatory prejudices.[65]

THE UNITED STATES GOVERNMENT'S STATED POSITION AGAINST SEX-SELECTION ABORTION

In 2007, the U.S. delegation to the United Nations Commission on the Status of Women advocated for a resolution condemning sex-

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[57] *Id.*

[58] American College of Obstetricians and Gynecologists, Committee on Ethics. Committee Opinion: *Sex-Selection.* No. 360, Feb. 200, *available* at http://www.acog.org/from__home/publications/ethics/co360.pdf.

[59] *Id.*

[60] United Nations, *Gender Equality, Equity, and Empowerment of Women.* Population and Development: Programme of Action adopted at the International Conference on Population and Development, New York, p. 17–21 (September 5–13, 1994).

[61] *Ethical Guidelines on Sex-Selection for Non-Medical Purposes,* FIGO Committee for the Ethical Aspects of Human Reproduction and Women's Health. Intl. J. Gynaecol. Obstet. 92: 329–30 (2006). An abortion to eliminate an unborn child with a sex-linked disease is sometimes referred to as an abortion for "medical purposes" or "therapeutic purposes."

[62] London Daily Telegraph, *Abortion law is clear,* Interview with Marie Stops Medical Director Paula Franklin, February 23, 2012, *available at* http://www.telegraph.co.uk/health/healthnews/9101549/Marie-Stopes-medical-director-abortion-law-is-clear.html.

[63] American College of Obstetricians and Gynecologists, Committee on Ethics, *supra,* note 58.

[64] *Id.*

[65] *Id.*

selection abortion worldwide.[66] The U.S. House of Representatives has passed resolutions condemning the People's Republic of China for its failure to end sex-selection abortion and gendercide.[67]

ENFORCEABILITY

A common criticism of sex-selection bans is the difficulty of enforcement. The motive for obtaining an abortion is a key element of the crime, and opponents argue that the motive will often be impossible to ascertain. H.R. 3541 does not add a requirement that health care providers inquire as to the reasons a woman seeks abortion.

H.R. 3541 is a civil rights law, specifically amending the Civil Rights section of the U.S. criminal code.[68] While enforcement presents challenges due to proof issues, this is true of all civil rights laws where the motive for adverse action is a key element of the offense. Even so, the United States has successfully prosecuted violations of civil rights laws, and H.R. 3541 can be adequately enforced as well.

THE UNITED KINGDOM'S ENFORCEMENT OF ITS SEX-SELECTION ABORTION BAN

Sex-selection abortion is banned in the U.K.[69] As in the United States, healthcare professionals in the U.K. encounter sex-selection mostly as a cultural practice among persons tracing their lineage to countries where sex-selection abortion is common. In both England and Wales, there is evidence that parents choose to abort females more often than males.[70] The *London Daily Telegraph* reports that sex-selection abortion is believed to be "fairly widespread" in the U.K.[71]

In February 2012, the *London Daily Telegraph* reported that it conducted a sting operation against multiple abortion providers to see if medical professionals would violate the law by agreeing to perform or facilitate sex-selection abortions. Acting on specific information that doctors were performing sex-selection abortions in violation of British law, undercover reporters accompanied pregnant women to nine clinics where the women requested a sex-selection abortion. Three of the nine clinicians agreed to schedule the illegal abortions, with one of the clinicians, Dr. Raj Monan, acknowledging on tape that a sex-selection abortion is comparable to "female infanticide."[72] A second offender, Ms. Prabha Sivaraman,

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[66] H. Res. 530, 108th Cong. (2004); H. Res. 794, 109th Cong. (2006). (In 2007, the United States unsuccessfully pushed a resolution at the United Nations to condemn sex-selection abortion worldwide.) *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).

[67] H. Res. 530, 108th Cong. (2004); H. Res. 794, 109th Cong. (2006).

[68] 18 U.S.C.A. § 13.

[69] The Abortion Act of 1967, c. 87, § 7 (U.K.).

[70] Claire Newell and Holly Watt, London Daily Telegraph, *Abortion Investigation: Doctors Filmed Agreeing to Abortions, No Questions Asked,* February 22, 2012, *available at* http://www.telegraph.co.uk/health/healthnews/9099511/Abortion-investigation-doctors-filmed-agreeing-illegal-abortions-no-questions-asked.html.

[71] Allison Pearson, *In the Third World, Unwanted Baby Girls Disappear. It's Called Gendercide. And it is Happening Here Too,* London Daily Telegraph, February 24, 2012 *available at* http://www.telegraph.co.uk/health/healthnews/9103831/In-the-third-world-unwanted-baby-girls-disappear.-Its-called-gendercide.-And-its-happening-in-this-country-too.html.

[72] Holly Watt, Claire Newell, and Robert Winnett, London Daily Telegraph, *Scotland Yard Launches Investigation into Doctors who Agreed to Illegal Abortions of Baby Girls,* February 12, 2012, *available at* http://www.telegraph.co.uk/health/healthnews/9103839/Scotland-Yard-launches-investigation-into-doctors-who-agreed-to-illegal-abortions-of-baby-girls.html.

said, "I don't ask questions" about the reason for the abortion, although she had already been told, and she urged her physician colleague to cover the crime through the private health care system rather than the state system because "you're part of our team and she doesn't want questions asked." Some health care professionals offered to falsify paperwork to arrange the abortions.[73]

Arguably just as important as the three clinics that agreed to break the law, there were six clinics that refused to act criminally, telling the women that they were unable to provide a sex-selection abortion. If the U.K. did not have a sex-selection abortion ban, presumably these clinics would have provided the abortions. Therefore, this investigation demonstrates that sex-selection abortion bans can prevent sex-selection abortions. Also, the investigation shows that laws in fact *are* followed by a majority of persons, and therefore are effective in deterring the undesired, illegal behavior.

On learning of the illegal activity, Scotland Yard launched an investigation.[74] U.K. Health Secretary Andrew Lansley convened an emergency meeting of top officials who reported the offenders to the police and to the General Medical Council. Secretary Lansley described sex-selection abortion as "morally repugnant" and vowed to bring the "full force of the law," including imprisonment, to bear on doctors who violate the law. Dr. Tony Falconer, President of the Royal College of Obstetrics and Gynaecology raised the specter that women in the U.K. may be experiencing coercion, including violence, to force sex-selection abortions, and that the "priority should be to identify these women and provide them with support." [75] Cynthia Bower, the head of Britain's Care Quality Commission (the National Health Service oversight entity) quickly resigned her job. The Chief Medical Officer dispatched written instructions to all British abortion clinics reminding them of their "responsibilities." The Department of Health called for an immediate investigation.

Gillian Lockwood, the former vice chair of the Royal College of Obstetricians and Gyneacologists Ethics Committee told BBC Radio that, "Every clinician working in the field in the U.K. is very well aware that a foetus being the wrong gender is not grounds for termination under any circumstances." She added that new blood tests that can determine the sex of the baby at much earlier stages of pregnancy (first trimester) "may fuel the desire for designer babies." [76]

THE COUNCIL OF EUROPE

Last year, the Council of Europe recommended that member states, including Britain, stop telling parents the gender of their baby because of concerns that this information was encouraging sex-selection abortion.[77] The motion, entitled "Sex-Selective Abortion—Gendercide" (Doc. 12258) calls for the member states of the Council of Europe to "condemn sex-selective abortion, wherever and whenever it occurs" and warns that "the widespread availability of

[73] Newell, *supra,* note 68.
[74] Watt, *supra,* note 70.
[75] *Id.*
[76] Newell, *supra,* note 68.
[77] Council of Europe, Parliamentary Assembly, *Sex-Selective Abortion—Gendercide,* Doc. 12258, May 11 2010, *available at* http://assembly.coe.int/Documents/WorkingDocs/Doc10/EDOC12258.pdf.(This motion binds the signatories, including Italy, the U.K., Spain, Austria, Ireland, Serbia, Estonia, Moldova, Bulgaria, Liechtenstein, and Lithuania.)

prenatal sex-determination technology [is] lead[ing] to a new global trend: sex-selective abortion, . . . Among the countries most strongly affected by this new trend are China, India, South Korea, Taiwan, but also some European countries."[78] Not coincidentally, some Americans tracing their lineage to these countries are some of the same sub-communities that manifest unnatural sex-ratios in the United States.[79]

Considering possible consequences of this "gendercide," the document affirms that this "gender imbalance constitutes a serious threat for global security."[80] The selective pre-natal killing of females will in the near future lead to a further radical decline of birth rates, which could "dangerously undermine the sustainability of entire national economies."[81]

The motion urges that the use of pre-natal diagnostics should be strictly limited "to identify[ing] medical conditions that can be treated during pregnancy" and not for sex-selective abortions. Many European hospitals have stopped giving parents information about the sex of an unborn child.[82] Unfortunately, blood tests that purport to disclose the sex of the baby are widely available on the Internet.[83]

THE UNITED NATIONS

Also recognizing this emerging trend, five United Nations agencies have together issued in June 2011 an interagency statement on "Preventing Gender-Biased Sex-Selection." The statement, based on an extensive report, requests "renewed and concerted efforts . . . to address the deeply rooted gender discrimination against women and girls which lies at the heart of sex selection."[84]

COERCION

H.R. 3541 forbids coercing women to obtain abortions prohibited under the Act because sex-selection abortions are oftentimes coerced.[85] Coercion is the opposite of "choice."[86] Evidence shows that women around the world—including inside the United States—can be subject to severe physical abuse and coercion to force a sex-selection abortion.[87]

A 2011 study, by the University of California, San Francisco, interviewed Indian-American immigrant women in California, New York, and New Jersey who had sought sex-selection abortions in the United States between 2004 and 2009.[88] The purpose of the study was to understand how women who are pressured to bear sons react in a country where reproductive choice is allowed and sex-selection technologies are openly marketed and available. Re-

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[78] *Id.*
[79] Almond and Edlund, *supra* note 13.
[80] Council of Europe, Doc. 12258, *supra,* note 77.
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] World Health Organization, *Preventing Gender-Biased Sex Selection,* an interagency statement of the Office of the High Commissioner of Human Rights, United Nations Population Fund (UNFPA), United Nations Children's Fund (UNICEF), United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), and World Health Organization (WHO), 2011, *available at* http://whqlibdoc.who.int/publications/2011/9789241501460__eng.pdf.
[85] H.R. 3541, 112th Cong., 1st session, § 250(a)(2).
[86] *Roe v. Wade,* 410 U.S. 113 (1973).
[87] Puri, *supra* at 1170.
[88] *Id.*

searchers chose two U.S. based clinics offering elective ultrasound in large South Asian immigrant communities as research sites, with the consent of the clinic directors.[89]

Because the researchers had reason to fear for the participants' exposure to marital violence, all subjects were offered information on local South Asian women's organizations offering assistance for victims of family violence.[90] Measures to prevent domestic violence in the context of abortion are not standard in the U.S., but for women from countries with strong son preference, failure to bear a son is a serious matter; the birth of a child of the wrong sex could result in a brutal death for the mother at the hands of the father and mother-in-law.[91] For example, photojournalist Walter Astrada's documentary tells the story of an Indian woman who was tortured and abandoned by her husband and mother-in-law for refusing to abort twin girls.[92]

Nearly half of the participants had already had a sex-selection abortion, with some having as many as four sex-selection abortions.[93] The women sought varying forms of sex-selection, with 6% using PGD, 15% using sperm sorting, and 78% using ultrasound and sex-selective abortion.[94] The cost of sperm sorting and PGD is prohibitive for most couples.[95] Also, husbands of the women believed that sperm sorting and PGD are less desirable options for sex-selection because they are "unnatural," whereas conception followed by abortion was "natural." The participants expressed frustration with American gynecological practice which typically only reveals the sex of an unborn child at approximately 20 weeks after fertilization. Instead, they preferred "private clinics" where clinic staffers will reveal the sex with ultrasound at just 12 weeks gestation.[96]

Women who carried a female unborn child to term said they were subject to varying degrees of verbal and physical abuse. Women identified female in-laws and husbands as sources of significant pressure to have male children. This was true even if the in-laws lived in India.[97] Participants told of mothers-in-law who tell them they are useless, or who threaten to throw them out of the family if the daughter-in-law cannot bear a son. One mother-in-law even threatened to commit suicide if the daughter-in-law did not bear a son- instigating the wrath of the entire family against the daughter-in-law.[98]

Husbands threatened divorce or abandonment, both serious consequences for an uneducated woman with no family in the United

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[89] *Id.*
[90] *Id.*
[91] Bilal Sarawy, BBC News, *Afghan Woman is Killed for Giving Birth to a Girl,* (January 30, 2012)(A 22 year old Afghan woman had her feet bound by her mother-in-law while her husband strangled her for giving birth to the couple's third daughter.) *available at* http://www.bbc.co.uk/news/world-asia-16787534; Times of India, TNN (AP), *Pregnant Woman Burnt to Death,* (August 15, 2005)(Nita Koli was set on fire by her husband and mother-in-law for repeatedly bearing daughters instead of sons.) *available at* http://articles.timesofindia.indiatimes.com/2005-08-19/india/27862684__1__pregnant-woman-morbi-police-female-foetus.
[92] Walter Estrada, Alexia Foundation, PhotoBlog, MSNBC.com, Oct. 10 2010, *available at* http://photoblog.msnbc.msn.com/__news/2010/10/01/5214051-undesired-in-india-boys-are-prized-over-girls-with-violent-results.
[93] Puri, *supra* note 8, at 1171.
[94] *Id.*
[95] *Id.* at 1172.
[96] *Id.*
[97] *Id.*
[98] *Id.*

States.[99] Gender inequality between husband and wife manifests itself strongly in the immigrant context, because the wife's poorly developed support system can make her more vulnerable to reproductive coercion and physical abuse.[100] Also, immigrant women felt that having a son is even more important in the new country than in the old, since men are thought to be better equipped to navigate the complexities of immigrant life. Immigrant women are at greater risk for domestic abuse and violence because of linguistic barriers and a lack of familiarity with American social services.[101]

When explaining why they sought sex-selection, the women often described the suffering of female relatives who had no sons, including social stigma and a lack of economic support, respect, and stability. Also, many of them thought that life is too hard for women in general, desiring to prevent a daughter from suffering the way that they themselves have suffered. Finally, most were concerned that a daughter would have premarital sex if raised in the United States, and that this would bring dishonor to the family. These concerns were consistent across all socioeconomic levels, even among the 23% that held advanced degrees in medicine, law, nursing and scientific research.[102]

Women who refuse sex-selection abortions are sometimes physically abused. A woman may be denied food, water, and rest to induce an abortion where it is determined that the woman is carrying a female unborn child.[103] Some women described being hit, pushed, choked and kicked in the abdomen in a husband's attempt to forcibly terminate a female unborn child.[104] Pregnancy is already a vulnerable time for women; the most common cause of death for pregnant women in the United States is homicide, often at the hands of the unborn child's father.[105] Likewise, in the wake of an expose on sex-selection abortion in the U.K., Dr. Tony Falconer, President of the Royal College of Obstetrics and Gynaecology, raised the specter that women may be experiencing violence and coercion to force sex-selection abortions, and that the "priority should be to identify these women and provide them with support." [106]

A growing body of research documents the relationship between intimate partner violence and reproductive coercion, sometimes resulting in forced sex and denial of healthcare services if pregnant.[107] Sunita Puri, M.D., M.S., a medical resident at the UCSF Department of Internal Medicine has noted that, "health care providers are often well positioned to intervene or suggest options, but may be hesitant to approach issues perceived as 'cultural." [108] Puri's study concluded that pregnancy, abortion, and the use of re-

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[99] *Id.*
[100] *Id.* at 1174.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 1173.
[104] Id.
[105] Jeani Chang, MPH, Cynthia Berg, MD, MPH, Linda Saltzman, PhD, Joy Herndon, MS, *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States: 1991–1999,* Am. J. Public Health, March 2005, at 471–477.
[106] Watt, *supra,* note 70.
[107] See Miller, Jordan, Levenson & Silverman, 2010, Reproductive Coercion; Connecting the Dots between Partner Violence and Unintended Pregnancy, *Contraception,* 81,457–59; Thiel de Bocanegra, Rostovtseva D. P., Khera S. & Godhwani, N. 2010. Birth Control Sabotage and Forced Sex: Experiences Reported by Women in Domestic Violence Shelters, *Violence Against Women, 14,* 1382–1396.
[108] Puri, *supra* note 8, at 1174.

productive technologies may be a product of an abusive environment created by marital partners, an extended family, or both.[109] Further, participants recognized that the ready availability and legality of ultrasound technology in the U.S. increased the pressure and even obligation to use it.[110]

One-third of the women in the study reported a history of family violence exacerbated when they did not give birth to a son.[111] That they are at increased risk for psychological and physical morbidity is documented by their descriptions of depression, anxiety, chronic pain, physical abuse, closely spaced pregnancies, and "forced abortions." Sex-selection abortion has long been considered a form of violence against women, and the study proved that both the women and the unborn daughter are victims of violence where sex-selection abortion is legally available but not sought by the woman. [112]

The study found that 40% of the women had terminated prior pregnancies when they learned that the unborn child was female. Of the women who discovered they were pregnant with a girl during the interview period, 89% underwent an abortion. Of those that did not abort their unborn daughters, 100% expressed ambivalence about prior sex-selection abortions.[113] Further, 100% cited physical and psychological trauma from the past abortions as reasons for not seeking another.[114] Most tragically, 100% expressed guilt, shame and sadness over their inability to "save" the daughters they had aborted.[115]

RACE-SELECTION ABORTION

"Race-selection abortion" is defined in the findings of H.R. 3541 as, "an abortion performed for purposes of eliminating an unborn child because the child or a parent of that child is of an undesired race." [116] A thorough review of the American family planning movement and its close affiliation with the American Eugenic Society reveals a history of targeting African-Americans and other minorities for "population control." [117] This history arguably contributes to the current statistic that a black baby is five times as likely to be aborted as a white baby, and often in a federally subsidized clinic.[118]

Abortion is the leading cause of death in the black community.[119] With approximately 450,000 black abortions per year, more black Americans are lost to abortion annually than are lost to cancer, heart disease, diabetes, AIDS, and violence combined.[120] These statistics are supported by comparing the abortion statistics of the

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[109] *Id.;* See also Moore, Frohwirth, & Miller, 2010. *Male Reproductive Control of Women who have Experienced Intimate Partner Violence in the United States,* Social Science and Medicine, *70,* 1737–1744.
[110] Puri, supra note 8, at 1175.
[111] *Id.* at 1174.
[112] *Id.*
[113] Puri, supra note 8, at 1173.
[114] *Id.*
[115] *Id.*
[116] H.R. 3541, 112th Cong., 1st session, § 250(a)(2)(C).
[117] Edwin Black, *War Against the Weak: Eugenics and America's Campaign to Create the Master Race,* Ch. 5 "Legitimizing Raceology." p. 63–85 (New York 2004).
[118] Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture,* Guttmacher Policy Review, Guttmacher Institute (vol. 11, no. 3, Summer 2008).
[119] *Id.*
[120] National Vital Statistics Reports, Vol. 58, No. 19, May 20, 2010. Table 1. *Number of Deaths, Death Rates, and Age Adjusted Death Rates by Race and Sex: United States,* 1940, 1950, 1960, 1970, and 1980–2007.

Alan Guttmacher Institute (formerly the research arm of Planned Parenthood) to the National Vital Statistics annual reports showing number of deaths by cause and race.[121] The numbers for each of these variables have remained relatively constant.[122]

That American elites may have had "group targeting" in mind for family planning programs was indicated by Supreme Court Justice Ruth Bader Ginsburg in a 2009 interview with the *New York Times:*

> Ginsburg: "Reproductive choice has to be straightened out . . . "
>
> Emily Bazelon (NYT): "Are you talking about . . . the lack of Medicaid for abortions for poor women?"
>
> Ginsburg: "Yes, the ruling about that surprised me. [Harris v. McRae—in 1980 the court upheld the Hyde Amendment, which forbids the use of Medicaid for abortions.] Frankly, I had thought that at the time Roe was decided, there was concern about population growth and particularly *growth in populations that we don't want to have too many of***.** So that Roe was going to then be set up for Medicaid funding for abortion. *Which some people felt would risk coercing women into having abortions when they really didn't want them.* But when the court decided McRae, the case came out the other way. And then I realized that my perception of it had been wrong altogether." [123]

Justice Ginsburg never defined the "we" who did not want "too many" of certain "populations," her comments suggest she was including herself in the group. Ruth Bader Ginsburg was a leader in the women's movement during the 1960's and 1970's, serving as the founder and counsel of the ACLU's Women's Rights Project from 1972–1980, the time during which *Roe v. Wade* became law.[124]

MARGARET SANGER'S EUGENIC LEGACY CONTINUES THROUGH TODAY'S FEDERALLY FUNDED PLANNED PARENTHOOD

The trailblazer of the American family planning movement was Margaret Sanger. Margaret Sanger was a eugenicist whose ideology permeated the family planning movement of the 20th century. Many eugenicists strongly espoused racial supremacy and "purity," particularly of the "Aryan" race. They hoped to purify the bloodlines and improve the human race by encouraging the "fit" to reproduce and encouraging the "unfit" to restrict their reproduction. Their tactics to contain the "inferior" races included segregation, sterilization, laws restricting interracial marriage, birth control, and even extermination.[125]

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[121] www.guttmacher.org; http://www.cdc.gov/nchs/nvss.htm.

[122] *Id.*

[123] Emily Bazelon, The Place of Women on the Court, *New York Times Magazine* http://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html?_r=2 (July 7, 2009); Melinda Hennenberger, Why Emily Bazelon Didn't Follow Up on Justice Ginsburg's Abortion Comment, Politics Daily, http://www.politicsdaily.com/2009/07/17/why-emily-bazelon-didnt-follow-up-on-ginsburgs-offensive-abort/(July 17, 2009).

[124] *Roe v. Wade,* 410 U.S. 113 (1973); Cornell University Law School Legal Information Institute available at http://www.law.cornell.edu/supct/justices/ginsburg.bio.html.

[125] Black, *supra,* note 119, at 19, 127. Black does not list abortion as a eugenic tactic; Abortion was largely illegal during the era of American eugenics.

The fruit of Sanger's labor was the American Birth Control League (ABCL), later known as the Birth Control Federation of America (BCFA), later renamed "Planned Parenthood Federation of America."[126]

Sanger built the work of the ABCL, and, ultimately, Planned Parenthood, on the ideas and resources of the eugenics movement. Virtually all of the organization's board members were eugenicists.[127] Eugenicists financed the early projects, from the opening of birth control clinics to the publishing of literature that addressed population control. Eugenicists comprised the speakers at conferences, authors of literature and the providers of family planning services. The International Planned Parenthood Federation was originally housed in the offices of the American Eugenics Society. The two organizations remained intertwined for years.[128]

Sanger's early writings express her desire to rid society of "human waste":

> It [charity] encourages the healthier and more normal sections of the world to shoulder the burden of unthinking and indiscriminate fecundity of others; which brings with it, as I think the reader must agree, a dead weight of human waste. Instead of decreasing and aiming to *eliminate* the stocks that are most detrimental to the future of the race and the world, it tends to render them to a menacing degree *dominant.*[129]

The Sanger legacy manifests itself today in the practices of Planned Parenthood and other abortion providers. Planned Parenthood has not run from Sanger's eugenic legacy. In fact, several of the Planned Parenthood facilities, such as in New York City and Tucson, are named the "Margaret Sanger Center." Also, each year, Planned Parenthood bestows the "Margaret Sanger Award." The official Planned Parenthood web site describes this award: "Our highest honor, the Planned Parenthood Federation of America Margaret Sanger Award, is presented annually to recognize leadership, excellence, and outstanding contributions to the reproductive health and rights movement." Past recipients include former Supreme Court Justice Harry Blackmun, who voted to legalize abortion nationwide in Roe v. Wade, and Secretary of State Hillary Clinton.[130]

The "Margaret Sanger Award" is not to be confused with Planned Parenthood's "Maggie Award"—also named for Margaret Sanger—that is given annually to media outlets that raises the abortion in-

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[126] Robert G. Marshall and Charles A. Donovan, *Blessed are the Barren: The Social Policy of Planned Parenthood* p. 24–25 (San Francisco: Ignatius Press, 1991). (The BCFA members voted unanimously at a special January 29, 1942, meeting to change the organization's name to the Planned Parenthood Federation of America. By then, BCFA had 34 state league affiliates. The state leagues followed suit in changing their name and bylaws. Particularly, the New York State Federation for Planned Parenthood's old bylaws stipulated that the object was: "To develop and organize on sound *eugenic,* social and medical principles, interest in and knowledge of *birth control* throughout the State of New York as permitted by law [emphasis added]." The new bylaws replaced the words "birth control" with "planned parenthood." "Eugenics" was dropped in 1943 because of its unpopular association with the German government's race-improving eugenics theories which culminated in the Holocaust).

[127] Angela Franks, *Margaret Sanger's Eugenic Legacy: The Control of Female Fertility* 10–12. (Jefferson, N.C.: McFarland, 2005).

[128] *Id.* at 104–107.

[129] Margaret Sanger, *The Pivot of* Civilization, at 108 (New York: Brentano's, 1922) (emphasis added).

[130] *See* http://www.plannedparenthood.org/about-us/newsroom/politics-policy-issues/ppfa-margaret-sanger-award-winners-4840.htm.

dustry's profile. Planned Parenthood's web site reads: "The Planned Parenthood Federation of America (PPFA) Maggie Awards recognize exceptional contributions . . . that enhance the public's understanding of . . . abortion, and international family planning. Named after Planned Parenthood founder Margaret Sanger, the annual awards cover categories: Commentary, Daily Print Reporting. . . ." [131]

The eugenic legacy of Planned Parenthood has led many Americans, particularly those in the black community, to question, why a large number of abortion clinics are located in the inner city, with nearly 50% of black pregnancies ending in abortion, often at government subsidized health clinics.[132] Significantly, the number of black abortions is likely significantly underreported, simply because there exists no comprehensive abortion data clearinghouse that gathers complete abortion statistics from all 50 states. Those states that do report often fail to include the race of the child or mother, and rarely tally the increasingly common RU–486 abortions.[133] Nonetheless, the Federal Government continues to give hundreds of millions annually to abortion providers through Title X, in addition to potentially hundreds of millions more through Title XX.

PUBLIC SUPPORT

STATE LEVEL PRENDA INITIATIVES

PRENDA statutes have progressed with broad support at the state level. Arizona passed a bill nearly identical to H.R. 3541 through both houses of the state legislature by 2/3 margins, and Gov. Brewer signed the bill into law in 2011.[134] In 2009, Oklahoma passed a sex-selection ban through the Oklahoma House by a 90% margin. Gov. Henry signed the bill into law, but it was later overturned by the Oklahoma Supreme Court on technical grounds that it violated a state mandated one subject rule.[135] Georgia passed a bill nearly identical to PRENDA through the state Senate by 2/3 margin and through three House committees with sizeable margins in 2010.[136] In 2012, Florida introduced a nearly identical bill in

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[131] *See* http://www.plannedparenthood.org/about-us/newsroom/politics-policy-issues/ppfa-maggie-awards-10047.htm.

[132] See U.S. National Center for Health Statistics, National Vital Statistics Reports (NVSR), *Births: Final Data for 2006,* Vol. 57, No. 7, January 7, 2009; and *Births: Preliminary Data for 2007,* Vol. 57, No. 12, March 18, 2009; and earlier reports; Volume 58, Number 4 October 14, 2009 Estimated Pregnancy Rates for the United States, 1990–2005: An Update by Stephanie J. Ventura, M.A.; Joyce C. Abma, Ph.D.; William D. Mosher, Ph.D., Division of Vital Statistics; Stanley K. Henshaw, Ph.D., The Guttmacher Institute; Trends in the Characteristics of Women Obtaining Abortions, 1974 to 2004, See also "Abortion Rate Among Black Woman Far Exceeds Other Groups," FOX NEWS, (April 9, 2008), *available at* http://www.foxnews.com/story/0,2933,348649,00.html. (The percentage of black unborn children aborted can be derived by comparing the number of black births in the National Vital Statistics to the number of black abortions reported by the Alan Guttmacher Institute ("AGI"), widely considered to be the authority in abortion statistical information. One should use caution, however, when examining abortion statistics because abortion reporting is incomplete. Some states fail to report at all. Therefore, all statistics showing abortion numbers represent minimum estimates or floors, not accurate counts. AGI functioned as the research arm of the federally funded Planned Parenthood for many years before becoming a separate entity in recent years).

[133] See http://www.ru486.com. (RU–486 is the generic name of mifepristone in the U.S., and is sometimes referred to as "the abortion pill," non-surgical abortion, or "medical abortion." Non-surgical abortions using RU486 are performed in the first 63 days of the first trimester. Non-surgical abortion is usually in pill form (Mifepristone or RU486), but can also be administered by injection or in liquid form (methotrexate)). http://www.Mifepristone.com.

[134] H.B. 2443 (Az. 2011).

[135] H.B. 1595 (Okla. 2009).

[136] S.B. 529/H.B. 1155 (Ga. 2010).

both the Florida House and Senate.[137] The bill passed two House subcommittees by a substantial margin.[138] Idaho introduced a similar bill in 2010.[139] In total, seven states have introduced either a bill nearly identical to PRENDA or a stand-alone sex-selection ban.[140]

POLLING

The American people want H.R. 3541. According to a 2006 Zogby poll, 86% thought that sex-selection abortion should be illegal. Four percent were unsure, and only 10% believed that sex-selection abortion should be legal.[141]

SUPPORTERS OF H.R. 3541

H.R. 3541 is supported by the Alliance Defense Fund, the Susan B. Anthony List, the National Right to Life, the National Black Pro-Life Union, The LEARN action network (a network of thousands of black pastors), Dr. Alveda King, niece of the Reverend Dr. Martin Luther King, Jr., the Population Research Institute, Women's Rights Without Frontiers, the American Center for Law and Justice, the Concerned Women for America, the Family Research Council, Focus on the Family, Liberty Council, the Traditional Values Coalition, the Filipino Family Fund, the Southern Baptist Conference, Anglicans for Life, Students for Life, and many other organizations.

BILL ANALYSIS

MECHANICS OF H.R. 3541

H.R. 3541 is a criminal law containing four prohibitions:

1. Proscribes the performance of an abortion with knowledge that the abortion is sought based on the sex, gender, color or race of the child, or the race of a parent of the child. These abortions are defined in the bill as "sex-selection abortions" or "race-selection abortions." Both terms are defined in the bill as elective procedures predicated upon sex or race discrimination.
2. Prohibits coercion of either a sex-selection or race-selection abortion.
3. Prohibits solicitation or acceptance of funds for the performance of a sex-selection or race-selection abortion.[142]
4. Prohibits the transport of a woman into the United States or across state lines for the purpose of obtaining a sex-selection or race-selection abortion.

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[137] H.B. 1327/S.B. 1702 (Fl. 2012).
[138] *Id.*
[139] H.B. 693 (Id. 2010).
[140] Sara Rubin, The New Push for Abortion Restrictions, The Atlantic, (March 18, 2010)http://www.theatlantic.com/politics/archive/2010/03/the-new-push-for-abortion-restrictions/37656/
[141] Press Release, Zogby International, *Support for Abortion in Sharp Decline,* Jan. 23, 2006, *available at* http://zogby.com/news/2006/01/23/support-for-abortion-in-sharp-decline/; "New Zogby International Poll: Americans Increasingly Favor Pro-Life Positions," LifeNews.com, March 27, 2006, *available at* http://www.lifenews.com/nat2164.html.
[142] *See* http://liveaction.org/planned-parenthood-racism-project. (This addition of this provision was prompted by a 2008 LiveAction expose showing that several federally funded Planned Parenthood clinics agreed to accept donations earmarked for the termination of black babies only. The donors made clear that their intent was to reduce the births in the black population at large. Under H.R. 3541, the acceptance of these donations would be a crime.)

H.R. 3541 amends title 18 of the U.S. Code.[143] H.R. 3541 also provides that a violation of the Act is deemed to be a violation of the Civil Rights Act of 1964.[144] Therefore, penalties of the Civil Rights Act of 1964 attach, such as the loss of Federal funding for offenders. The Attorney General may prosecute or seek injunctive relief.[145] Finally, a private right of action lies for family members or for a woman who is coerced to submit to a sex-selection or race-selection abortion. H.R. 3541 provides damages to reflect the loss of a human life, resembling wrongful death damages.

CONSTITUTIONAL ANALYSIS

H.R. 3541 presents novel issues for review: (1) whether an unborn child can enjoy any degree of protection from discrimination as a matter of equal protection under United States law; (2) whether the prohibition of only those abortions sought on the basis of sex or race constitute an "undue burden" on a woman's right to choose an abortion.

Because H.R. 3541 presents issues of first impression, one cannot be certain of the outcome in court, but H.R. 3541 can be upheld as constitutional under judicial precedents. Congress has the authority to pass H.R. 3541 under the power to regulate interstate commerce, the power granted under section 2 of the Thirteenth Amendment to "eradicate all badges of slavery," and the power under section 5 of the Fourteenth Amendment to eliminate all barriers to gender equality based on "invidious, archaic and overbroad stereotypes."[146]

THE FOURTEENTH AMENDMENT

The Supreme Court finds the right to an abortion as deriving from an implied right to privacy, via a liberty interest inherent in the Fourteenth Amendment, as a matter of substantive due process; this right builds on a precedential "penumbra," formed by an emanation from an earlier guarantee to unrestrained access to birth control, established in the case of *Griswold v. Connecticut.*[147] As Justice Douglas wrote, "specific guarantees . . . have penumbras, formed by emanations from those guarantees that help give them life and substance."[148] Building on the *Griswold*-derived penumbra, *Roe v. Wade* established a fundamental right for a woman

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[143] The penalties of title 18 attach; fines may reach $250,000.00 for individual offenders, $500,000.00 for corporations, and damages may be doubled where the offense results in loss of life.

[144] 42 U.S.C. § 2000d—2000d-7 (2009). Civil Rights Act of 1964, 42 U.S.C. § 3000e (1964). Title VI, provides that "No person in the United States shall, on the ground of race, color, or national origin. . . . be subject to discrimination under any program or activity receiving Federal financial assistance." President John F. Kennedy summarized the purpose of this provision: "Simple justice requires that public funds . . . not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination."

[145] 42 U.S.C. § 2000h-2 (1972); The Attorney General may also intervene: 42 U.S.C. § 2000h-2 (1972): the Attorney General may intervene in lawsuits in Federal court "seeking relief from denial of equal protection of the laws under the Fourteenth Amendment to the Constitution on account of race, color, religion, sex or national origin" in cases of general public importance. Title IX.

[146] *H.R. 3541, the "Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act (PRENDA) of 2011 before the Subcommittee on the Constitution, House Judiciary Committee,* 112th Cong. (Dec. 6, 2011) *2011* (Testimony of Steve Aden, Senior Counsel of the Alliance Defense Fund); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 439 (1968); *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 131 (1994).

[147] *Griswold v. Connecticut,* 381 U.S. 479 (1939).

[148] *Id.*

to decide whether to carry a pregnancy to term.[149] *Planned Parenthood v. Casey* further held that abortion restrictions are permissible but must not create an "undue burden" on a woman's right to abortion.[150] Even so, the *Casey* Court 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 fetus . . . ."[151]

No precedent has addressed the question of whether the liberty interest to make reproductive decisions is superior or inferior to the government's compelling interest in eradicating race and sex discrimination.

In 2007, *Gonzales v. Carhart* upheld the Federal Partial Birth Abortion Ban Act to serve the government interests of protecting the reputation of the medical community, preserving the integrity and ethics of the medical profession, and promoting societal respect for unborn life.[152] In light of the Supreme Court's decision in *Gonzales,* successful arguments could be made to uphold H.R. 3541's prohibition of both discriminatory abortions and coerced abortions, and the failure of medical professionals to report the commission of either.[153] H.R. 3541 addresses each of the interests identified in *Gonzales* by prohibiting medical professionals from performing procedures that Americans find discriminatory, barbaric, unethical, and even anathema to a woman's right to make reproductive decisions (in the case of coercion).

THE THIRTEENTH AMENDMENT

In 1866 Congress enacted the first Civil Rights Act.[154] This Act provided that: "[All citizens of the United States] of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens . . ."[155]

Congress found the power to enact the Civil Rights Act against infringements by the states through the Thirteenth Amendment, which prohibits "slavery [or] involuntary servitude, except as a punishment for crime. . . ."[156] and which gives Congress the "power to enforce this article by appropriate legislation."[157] As understood by Congress, the Thirteenth Amendment prohibits slavery and the opposite of slavery is liberty. Therefore any unwarranted restrictions on liberty that are race based, may be considered "incidents" of slavery,[158] and section 2 of the Thirteenth Amendment empowers Congress to protect citizens from unjust restrictions on liberty.

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[149] *Roe v. Wade,* 410 U.S. 113 (1973).
[150] *Planned Parenthood v. Casey,* 505 U.S. 833 (1992).
[151] *Id.*
[152] *Gonzales v. Carhart,* 550 U.S. 124, 157 (2007).
[153] *Id.*
[154] Civil Rights Act of 1866, § 14 Stat. 27 (1866).
[155] *Id.*
[156] U.S. CONST. amend. XIII, § 1.
[157] U.S. CONST. amend. XIII, § 2.
[158] *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 441 (1968).

The U.S. Supreme Court has recognized that the elimination of private race or sex discrimination is a sufficient government interest to justify regulation, even when contrasted against competing rights.[159] While one may have a right to engage in an activity, this does not equate to the right to engage in the activity in a discriminatory manner.

The Supreme Court's abortion jurisprudence does not require a different result. The Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey recognized* the essential holding of the Court in *Roe v. Wade*—that women possess the right to obtain an abortion without undue interference from the State before viability. That holding, *Casey* clarified, was based on the 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 stage.[160] The Supreme Court has made clear, however, that the government has a compelling interest in eliminating discrimination against women and minorities, and this compelling interest could prove sufficient to hold that such an abortion restriction is constitutional.

The findings of H.R. 3541 explicitly define sex-selection and race-selection abortions as elective procedures predicated on sex or race discrimination. With this finding, the bill makes clear that the target of the legislation is discrimination.

The balance of H.R. 3541's operative provisions are likewise well-grounded in Fourteenth Amendment and Commerce Clause jurisprudence. The term "based on [sex or race]" used by H.R. 3541 is similar to the term "on the grounds of" employed by Title VI, 42 U.S.C. § 2000d, which is incorporated by reference in H.R. 3541.[161] Both of these terms are functionally identical to the judicially developed term employed by Title VII of the 1964 Civil Rights Act, "because of . . . [*inter alia*] [race or sex]." The Act clarifies that the mother may not be prosecuted or held civilly liable under the Act, and thus the private right of action provisions strike only at the commercial activity of providing abortion, which clearly substantially impacts interstate commerce.[162]

THE COMMERCE CLAUSE

Insofar as H.R. 3541 targets persons who commit, finance or coerce a sex or race-selection abortion, Congress has broad powers under the Commerce Clause to enact this legislation in furtherance of the rights of equality secured by the Thirteenth and Fourteenth Amendments.[163] As the Supreme Court stated in *United States v. Lopez,* "[W]e have upheld a wide variety of congressional acts regulating intrastate economic activity where we have concluded that

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[159] *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.,* 477 U.S. 619, 628 (1986); *Roberts v. U.S. Jaycees,* 468 U.S. 609, 625 (1984); *Heart of Atlanta Motel, Inc., v. United States,* 379 U.S. 241 (1964).

[160] *Casey,* 505 U.S. at 846.

[161] Testimony of Steve Aden, *supra.*

[162] *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).

[163] *See U.S.C.A. Const. art. 1, § 8, cl. 3; Civil Rights Act of 1964, §§ 201–207, 201(a), (b)(1), (c)(1), 42 U.S.C.A. §§ 2000a to 2000a-6, 2000a(a), (b)(1), (c)(1); Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964); *Katzenbach v. McClung,* 379 U.S. 294 (1964); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968).

the activity substantially affected interstate commerce." [164] The economic activity regulated by H.R. 3541, abortion services, is demonstrably interstate and international in scope, and therefore well within the scope of Congress' power under the Commerce Clause.

Abortion impacts interstate commerce. Abortion is an interstate, international, multi-billion dollar business. There are, on average, greater than 1.2 million abortions performed in the U.S. each year.[165] This number represents a floor, not a ceiling, in that abortion reporting is not required, and many states do only scant or partial reporting of abortion data. At an average cost of $418 for a first trimester abortion, and $1,800-$3,000 for a late-term abortion, one can calculate that abortion revenues are approaching one billion annually.[166]

Women travel across state lines to an abortion provider, either because there are no abortion providers nearer to home, or to avoid various state regulations of abortion. Eighty-seven percent of all U.S. counties lacked an abortion provider in 2008, and thirty-five percent of the female population lives in those counties.[167] Mississippi, for example, has gone from eight abortion providers to one part-time abortionist, making abortionists in the border cities of neighboring states more convenient choices. South Dakota has been at times completely without a state based abortion provider, so that a single abortionist intermittently enters the state, providing the only surgical abortion services available. Further, as established in the hearings on the Child Interstate Abortion Notification Act (CIANA), minors are sometimes transported across state lines for abortions to avoid parental consent laws.[168]

Sex-selection abortions are typically late-term abortions, making interstate travel necessary for many American women who would seek one since late-term abortions are performed by few abortion providers.[169] Often there is no late-term abortion provider within a state. The sex of a baby is typically revealed by a gynecologist at twenty weeks gestation. Only 20% of abortion clinics offer abortion after 20 weeks.[170] Only 8% of all abortion providers offer abortions after 24 weeks.[171]

Hearings

The Committee's Subcommittee on the Constitution held a hearing on H.R. 3541 on Tuesday, December 6, 2011. The Subcommittee heard testimony from four witnesses: Steve Aden, Senior Legal Counsel for the Alliance Defense Fund; Steve Mosher, President of the Population Research Institute; Edwin Black, historian

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[164] *United States v. Lopez,* 115 S. Ct. 1624 (1994).

[165] *See,* www.guttmacher.org, Alan Guttmacher Institute.

[166] Alan Guttmacher Institute, *Facts on Induced Abortion in the United States,* August 2011; Jones R. K., et al., *Abortion in the United States: Incidence and Access to Services,* 2005, *Perspectives on Sexual and Reproductive Health,* 2008, 40(1):6–16.

[167] Jones R. K., et al., *Abortion in the United States: Incidence and Access to Services,* 2005, *Perspectives on Sexual and Reproductive Health,* 2008, 40(1):6–16.

[168] *Hearing before the Subcommittee on the Constitution of the House Judiciary Committee,* 109th Congress, 1st Session, on H.R. 748, March 3, 2005, Serial No. 109–3.

[169] Alan Guttmacher Institute, *Facts on Induced Abortion in the United States,* August 2011, http://www.guttmacher.org/pubs/fb_induced_abortion.html .(Only twelve percent of abortions in the United States are late-term, defined as occurring at 13 weeks or later).

[170] Jones R. K. et al., *Abortion in the United States: Incidence and Access to Services,* 2005, *Perspectives on Sexual and Reproductive Health,* 2008,40(1):6–16.

[171] *Id.*

and investigative journalist; and Miriam Yeung, Executive Director of the National Asian Pacific American Women's Forum (NAPAWF).

Committee Consideration

On February 16, 2012, the Committee met in open session and ordered the bill H.R. 3541, as amended, to be reported favorably to the House by a vote of 20–13, a quorum being present.

Committee Votes

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 3541.

1. An amendment by Mr. Franks to make technical amendments to the bill, including the addition of "(H.R. 3541)" to the title, and a clarification that a cause of action for a post-abortive woman who is subject to an illegal abortion under the law may bring suit against an offender of any prohibition. Agreed to by a vote of 12 to 10.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte			
Mr. Lungren	X		
Mr. Chabot			
Mr. Issa	X		
Mr. Pence			
Mr. Forbes	X		
Mr. King			
Mr. Franks	X		
Mr. Gohmert			
Mr. Jordan			
Mr. Poe			
Mr. Chaffetz	X		
Mr. Griffin			
Mr. Marino	X		
Mr. Gowdy			
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle			
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Ms. Waters			
Mr. Cohen			
Mr. Johnson		X	
Mr. Pierluisi		X	
Mr. Quigley		X	
Ms. Chu		X	
Mr. Deutch		X	
Ms. Sánchez			
Mr. Polis			
Total	12	10	

2. An amendment by Mr. Conyers to strike portions of the short title of the bill. Agreed to by a vote of 24 to 1.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Chabot	X		
Mr. Issa			
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Franks	X		
Mr. Gohmert			
Mr. Jordan	X		
Mr. Poe			
Mr. Chaffetz	X		
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee	X		
Ms. Waters			
Mr. Cohen			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu			
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis			
Total	24	1	

3. An amendment by Mr. Quiqley to delay the effective date of the bill. Defeated by a vote of 9 to 16.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert			
Mr. Jordan			
Mr. Poe		X	
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Ms. Waters			
Mr. Cohen			
Mr. Johnson, Jr.	X		
Mr. Pierluisi			
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch	X		
Ms. Sánchez	X		
Mr. Polis	X		
Total	9	16	

4. An amendment by Ms. Chu to add a section to the bill creating an Office of Pregnant Women. Defeated by a vote of 9 to 18.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa		X	
Mr. Pence			
Mr. Forbes			
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei			
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		

ROLLCALL NO. 4—Continued

	Ayes	Nays	Present
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen			
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez	X		
Mr. Polis	X		
Total	9	18	

5. An amendment by Ms. Chu to insert findings regarding various statements made by agencies of the United Nations. Defeated by a vote of 9 to 18.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz			
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei			

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren			
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen			
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez	X		
Mr. Polis	X		
Total	9	18	

6. An amendment by Mr. Nadler to replace portions of the bill with a provision prohibiting coercing a woman to have an abortion. Defeated by a vote of 10 to 18.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz			
Mr. Griffin			
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member			
Mr. Berman			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters			
Mr. Cohen			
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez	X		
Mr. Polis	X		
Total	10	18	

7. An amendment by Mr. Nadler to add a provision regarding a study of discriminatory employment practices toward pregnant women. Defeated by a vote of 12 to 19.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Smith, Chairman		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren			
Mr. Chabot		X	
Mr. Issa			
Mr. Pence			
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz			

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Mr. Griffin		X	
Mr. Marino		X	
Mr. Gowdy		X	
Mr. Ross		X	
Ms. Adams		X	
Mr. Quayle		X	
Mr. Amodei		X	
Mr. Conyers, Jr., Ranking Member			
Mr. Berman	X		
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Cohen			
Mr. Johnson, Jr.	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Deutch			
Ms. Sánchez	X		
Mr. Polis	X		
Total	12	19	

8. A motion to report the bill, as amended, favorably to the House. Adopted by a vote of 20 to 13.

ROLLCALL NO. 8

	Ayes	Nays	Present
Mr. Smith, Chairman	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren			
Mr. Chabot	X		
Mr. Issa	X		
Mr. Pence			
Mr. Forbes	X		
Mr. King	X		
Mr. Franks	X		
Mr. Gohmert	X		

ROLLCALL NO. 8—Continued

	Ayes	Nays	Present
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz			
Mr. Griffin	X		
Mr. Marino	X		
Mr. Gowdy	X		
Mr. Ross	X		
Ms. Adams	X		
Mr. Quayle	X		
Mr. Amodei	X		
Mr. Conyers, Jr., Ranking Member		X	
Mr. Berman		X	
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee			
Ms. Waters		X	
Mr. Cohen			
Mr. Johnson, Jr.		X	
Mr. Pierluisi		X	
Mr. Quigley		X	
Ms. Chu		X	
Mr. Deutch			
Ms. Sánchez		X	
Mr. Polis		X	
Total	20	13	

Committee Oversight Findings

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

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of House rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

Congressional Budget Office Cost Estimate

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to

the bill, H.R. 4965, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 19, 2012.

Hon. LAMAR SMITH, CHAIRMAN,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3541, the "Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226-2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable John Conyers, Jr.
Ranking Member

H.R. 3541—Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011.

As ordered reported by the House Committee on the Judiciary on February 16, 2012.

CBO estimates that implementing H.R. 3541 would have no significant cost to the Federal Government. Enacting the bill could affect direct spending and revenues; therefore, pay-as-you-go procedures apply. However, CBO estimates that any effects would be insignificant for each year.

H.R. 3541 would make it a Federal crime to perform certain abortions. Because the legislation would establish a new offense, the government would be able to pursue cases that it otherwise would not be able to prosecute. We expect that H.R. 3541 would apply to a relatively small number of offenders, so any increase in costs for law enforcement, court proceedings, or prison operations would not be significant. Any such costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 3541 could be subject to criminal fines, the Federal Government might collect additional fines if the legislation is enacted. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and later spent. CBO expects that any additional revenues and direct spending would not be significant because of the small number of cases likely to be affected.

CBO has not reviewed H.R. 3541 for intergovernmental or private-sector mandates. Section 4 of the Unfunded Mandates Reform Act excludes from the application of that act any legislative provision that establishes statutory rights prohibiting discrimination on

the basis of sex or race. Because the bill would give some individuals the right to take legal actions to prevent certain abortions, CBO has determined that the bill falls within that exclusion.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

Performance Goals and Objectives

The Committee states that clause 3(c)(4) of rule XIII of the Rules of the House of Representatives is inapplicable inasmuch as the measure does not authorize funding.

Advisory on Earmarks

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 3541 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f), or 9(g) of Rule XXI.

Section–by–Section Analysis

Section 1. Short Title

This section states that the short title of this bill is the "Prenatal Nondiscrimination Act of 2012."

Section 2. Findings and Constitutional Authority

Section 2 contains factual findings and the constitutional authority for the Act.

Section 3. Discrimination Against the Unborn on the Basis of Race or Sex

Section 3 amends Title 18 of the United States Code by adding a new section 250 at the end of Chapter 13:

Sec. 250—Discrimination Against the Unborn on the basis of race or sex

Prohibitions. Subsection (a) contains the criminal prohibitions of the bill: Subsection (a)(1) prohibits anyone from performing an abortion knowing that the abortion is sought based on the sex, gender, color or race of the child, or the race of a parent of that child; Subsection (a)(2) prohibits the use 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; Subsection (a)(3) prohibits the solicitation or acceptance of funds for the performance of a sex-selection abortion or a race-selection abortion; and Subsection (a)(4) prohibits the transportation of a woman into the United States or across a State line for the purpose of obtaining a sex-selection abortion or race-selection abortion. A violation or attempted violation of subsections (a)(1–4) shall result in a fine under title Title 18,[172] or imprisonment of not more than 5 years, or both.

[172] 18 U.S.C. § 3559. (Because the first four prohibitions of H.R. 3541 carry sentences of less than 5 years but more than 1 year, these crimes are Class E felonies). 18 U.S.C. § 3571. (The maximum statutory fine for individuals committing a Class E felony is $250,000, while the statutory maximum fine for organizations is $500,000—per count). 18 U.S.C. § 3559. (A violation of the reporting requirement carries a sentence of 6 months to 1 year, making this crime a Class A misdemeanor. A Class A misdemeanor carries a $100,000 maximum statutory penalty if the violation does not result in death, and a $250,000 maximum statutory penalty where the violation does result in death; courts could arguably interpret a violation of the reporting require-

Civil Remedies. Subsection (b) provides the civil remedies available under the bill: Subsection (b)(1) provides a civil action for a woman upon whom an abortion has been performed or attempted in violation of subsection (a)(2); Subsection (b)(2) provides a civil action for the father of an unborn child who is the subject of an abortion performed or attempted in violation of subsection (a), or a maternal grandparent of the unborn child if the pregnant woman is an unemancipated minor, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

Damages. Subsection (b)(3) defines "appropriate relief" in a civil action under subsection (b): Subsection (b)(3)(A) provides for "objectively verifiable" money damages for all injuries, psychological and physical, including loss of companionship and support, occasioned by the violation of section 250; Subsection (b)(3)(B) provides for punitive damages; Subsection (b)(4)(A) provides injunctive relief to a "qualified plaintiff" in a civil action to prevent an abortion provider from performing or attempting further abortions in violation of section 250.

"Qualified Plaintiff." Subsection (b)(4)(B) defines 'qualified plaintiff' as: (i) a woman upon whom a sex-selection or race-selection abortion is performed or attempted; (ii) the spouse of such woman; or (iii) the Attorney General.

Attorney's Fees. Subsection (b)(5) awards attorney's fees to prevailing plaintiffs. The award of reasonable attorneys' fees for successful plaintiffs follows standard Federal policy. Nearly all major civil rights [173] and environmental statutes [174] include one-way fee-shifting provisions. Other Federal statutes have brought entire additional areas of litigation under the one-way fee-shifting rule.[175]

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ment either way, depending upon the circumstances, such as whether an actual violation occurred, resulting in the death of the unborn child. Sentencing Commission fines levied for similar crimes are not available to inform sentencing recommendations for H.R. 3541 because the bill amends the civil rights section of the criminal code, where there is no perfectly comparable crime for comparison).

[173] See, e.g. Civil Rights Act of 1964, Title II, 42 U.S.C. §2000a-3(b) (2005) ("In any action [for discrimination in public accommodations] the court, in its discretion, may allow the prevailing party . . . reasonable attorney's fee as part of the costs. . . ."); Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k) (2005) ("In any action for denial of equal employment opportunities] the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee a part of the costs. . . ."); Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e-5(g)(2)(B) (2005) ("On a claim in which an individual proves a violation under section 703(m) [42 U.S.C. §2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of the claim under section 703(m). . . ."); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988(b) (2005) ("In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the revised statutes, title IX of Public Law 92–318, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964, or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee . . . ."); Civil Rights of Institutionalized Persons Act, 42 U.S.C. §1997a(b) (2005) ("In any action commenced under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs."); 42 U.S.C. §1997c(d) (2005) ("In any action in which the United States joins as an intervener under this section, the court may allow the prevailing party, other than the United States, a reasonable attorney's fee against the United States as part of the costs. . . .").

[174] See e.g. Clean Air Act, 42 U.S.C. §7607(f) (2005) (allowing the court to award costs including reasonable attorney's fees); Clean Water Act, 33 U.S.C. §1365(d) (2005) ("The court, in issuing a final order in any action [for violation of the Clean Water Act], may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.").

[175] See Civil Rights Attorney's Fee Award Act of 1976, Pub. L. No. 94–559, 90 Stat. 2641 (1976); Equal Access to Justice Act, Pub. L. No 96–481, 94 Stat. 2321 (1980).

Federal Funding. Subsection (c) provides for a loss of Federal funding for those persons or entities found guilty of violating subsection (a). Further, a violation of subsection (a) shall be deemed for the purposes of title VI of the Civil Rights Act of 1964 to be discrimination prohibited by section 601 of that Act.[176] Title VI of the Civil Rights Act of 1964 is titled "Nondiscrimination in Federally Assisted Programs," and section 601 provides that, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving *federal financial assistance."*

*******Federal Financial Assistance and Coverage Under Title VI:***

Title VI does not apply to the Federal Government.[177] It does, however, apply to state, local, or municipal agencies, and also to private entities.[178] In 1988, Congress enacted the Civil Rights Restoration Act of 1987,[179] to broadly define covered "programs and activities" under Title VI. Under that Act, the term "program or activity" means all of the operations of:

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government . . .

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship———

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation . . . any part of which is extended Federal financial assistance.[180]

As the Department of Justice's Title VI Legal Manual states: "[t]he clearest example of Federal financial assistance is the award or grant of money." [181]

Reporting Requirement. Subsection (d) provides that a physician, physician's assistant, nurse, counselor, or other medical or mental health professional shall report known or suspected violations of any of this section to appropriate law enforcement authorities. Whoever violates this requirement shall be fined under title 18 or imprisoned not more than 1 year, or both.[182]

Expedited Consideration. Subsection (e) provides that it shall be the duty of the United States district courts, United States

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[176] 42 U.S.C. § 2000d.

[177] See U.S. Dep't of Justice, Title VI Legal Manual 20 (2001).

[178] *Id.*

[179] Pub. L. No. 100–259 (1988).

[180] 42 U.S.C. 2000d-4a(2006). *See also* 28 C.F.R. 42.102(f) (defining "recipient of financial assistance").

[181] U.S. Dep't of Justice, supra note 128, at 10; *see also* 28 C.F.R. 42.102(c) (Title VI covers entities that receive grants and loans of Federal funds).

[182] 1 U.S.C. §§ 437d and 438 (regarding Federal campaign financing laws); 6 U.S.C. § 488f (regarding homeland security); and 46 U.S.C. §§ 3507 and 70107 (regarding ship passenger safety and port security). (Five other Federal statutes that require the reporting of information to "appropriate law enforcement authorities.").

courts of appeal, and the Supreme Court of the United States to expedite review of cases brought under the law.[183]

Exception. Subsection (f) provides that a woman who has a sex-selection or race-selection abortion may not be prosecuted or held civilly liable for any violation of the law.

"Abortion" defined. Subsection (g) defines abortion as "the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman, with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child, unless the act is done with the intent to: (1) Save the life or preserve the health of the unborn child; (2) Remove a dead unborn child caused by spontaneous abortion; or (3) Remove an ectopic pregnancy."

Severability. Section 4 provides that if any portion of the bill—on its face or as applied to any person or circumstance—is held invalid, such invalidity shall not affect the remainder of the bill.

Changes in Existing Law Made by the Bill, as Reported

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

TITLE 18, UNITED STATES CODE

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PART I—CRIMES

* * * * * * *

CHAPTER 13—CIVIL RIGHTS

Sec.
241. Conspiracy against rights.

* * * * * * *

250. Discrimination against the unborn on the basis of race or sex.

* * * * * * *

§ 250. Discrimination against the unborn on the basis of race or sex

(a) IN GENERAL.—Whoever knowingly—

(1) performs an abortion knowing that such abortion is sought based on the sex, gender, color or race of the child, or the race of a parent of that child;

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[183] 2 U.S.C. § 437h (relating to the McCain-Feingold campaign finance law); 2 U.S.C. § 922 (relating to emergency powers to restrain budget deficits); 5 U.S.C. § 5312 (relating to executive schedule pay rates); 8 U.S.C. § 1252 (relating to immigration removal orders); 13 U.S.C. § 141 (relating to census litigation); 31 U.S.C. § 301 (relating to the Department of the Treasury); and 42 U.S.C. § 6305 (relating to energy efficiency standards). (Federal statutes contain provisions requiring courts to hear certain types of cases in an expedited manner).

(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 funds for the performance of a sex-selection abortion or a race-selection abortion; or

(4) transports a woman into the United States or across a State line for the purpose of obtaining a sex-selection abortion or race-selection abortion;

or attempts to do so, shall be fined under this title or imprisoned not more than 5 years, or both.

(b) CIVIL REMEDIES.—

(1) CIVIL ACTION BY WOMAN ON WHOM ABORTION IS PERFORMED.—A woman upon whom an abortion has been performed pursuant to a violation of subsection (a)(2) may in a civil action against any person who engaged in a violation of subsection (a) obtain appropriate relief.

(2) CIVIL ACTION BY RELATIVES.—The father of an unborn child who is the subject of an abortion performed or attempted in violation of subsection (a), or a maternal grandparent of the unborn child if the pregnant woman is an unemancipated minor, may in a civil action against any person who engaged in the violation, obtain appropriate relief, unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion.

(3) APPROPRIATE RELIEF.—Appropriate relief in a civil action under this subsection includes—

(A) objectively verifiable money damages for all injuries, psychological and physical, including loss of companionship and support, occasioned by the violation of this section; and

(B) punitive damages.

(4) INJUNCTIVE RELIEF.—

(A) IN GENERAL.—A qualified plaintiff may in a civil action obtain injunctive relief to prevent an abortion provider from performing or attempting further abortions in violation of this section.

(B) DEFINITION.—In this paragraph the term "qualified plaintiff" means—

(i) a woman upon whom an abortion is performed or attempted in violation of this section;

(ii) any person who is the spouse or parent of a woman upon whom an abortion is performed in violation of this section; or

(iii) the Attorney General.

(5) ATTORNEYS FEES FOR PLAINTIFF.—The court shall award a reasonable attorney's fee as part of the costs to a prevailing plaintiff in a civil action under this subsection.

(c) LOSS OF FEDERAL FUNDING.—A violation of subsection (a) shall be deemed for the purposes of title VI of the Civil Rights Act of 1964 to be discrimination prohibited by section 601 of that Act.

(d) REPORTING REQUIREMENT.—A physician, physician's assistant, nurse, counselor, or other medical or mental health professional shall report known or suspected violations of any of this section to appropriate law enforcement authorities. Whoever violates this re-

quirement shall be fined under this title or imprisoned not more than 1 year, or both.

(e) EXPEDITED CONSIDERATION.—It shall be the duty of the United States district courts, United States courts of appeal, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under this section.

(f) EXCEPTION.—A woman upon whom a sex-selection or race-selection abortion is performed may not be prosecuted or held civilly liable for any violation of this section, or for a conspiracy to violate this section.

(g) PROTECTION OF PRIVACY IN COURT PROCEEDINGS.—

(1) IN GENERAL.—Except to the extent the Constitution or other similarly compelling reason requires, in every civil or criminal action under this section, the court shall make such orders as are necessary to protect the anonymity of any woman upon whom an abortion has been performed or attempted if she does not give her written consent to such disclosure. Such orders may be made upon motion, but shall be made sua sponte if not otherwise sought by a party.

(2) ORDERS TO PARTIES, WITNESSES, AND COUNSEL.—The court shall issue appropriate orders under paragraph (1) to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each such order shall be accompanied by specific written findings explaining why the anonymity of the woman must be preserved from public disclosure, why the order is essential to that end, how the order is narrowly tailored to serve that interest, and why no reasonable less restrictive alternative exists.

(3) PSEUDONYM REQUIRED.—In the absence of written consent of the woman upon whom an abortion has been performed or attempted, any party, other than a public official, who brings an action under this section shall do so under a pseudonym.

(4) LIMITATION.—This subsection shall not be construed to conceal the identity of the plaintiff or of witnesses from the defendant or from attorneys for the defendant.

(h) DEFINITION.—The term "abortion" means the act of using or prescribing any instrument, medicine, drug, or any other substance, device, or means with the intent to terminate the clinically diagnosable pregnancy of a woman, with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child, unless the act is done with the intent to—

(1) save the life or preserve the health of the unborn child;

(2) remove a dead unborn child caused by spontaneous abortion; or

(3) remove an ectopic pregnancy.

* * * * * * *

Dissenting Views

H.R. 3541, the "Prenatal Nondiscrimination Act (PRENDA) of 2012," as amended, is yet another assault by the Majority on women's reproductive rights. It undoes the constitutional guarantee of

a woman's right to choose that has been recognized by the U.S. Supreme Court for nearly 40 years since its historic holding in *Roe v. Wade*.[1] The bill would make abortions—at any point before or after viability—a crime under certain circumstances. And, it would provide an opportunity for endless and costly litigation because it would force a doctor, a court, and a jury to effectively attempt to read a woman's mind to determine what her thinking was when she chose to have an abortion. As a result, H.R. 3541 would have a profound impact on the practice of medicine and the doctor-patient relationship. It would turn medical personnel into "thought police" because they would be required to examine a woman's motives for choosing to have an abortion in order to limit the health care providers' own civil and criminal liability. Should this deeply flawed legislation become law, physicians would be risking such liability if they choose to inform a pregnant woman of the sex of her fetus or to discuss her options. Accordingly, numerous organizations deeply committed to protecting the rights of women and communities of color are staunchly opposed to this legislation, including The Leadership Conference on Civil and Human Rights,[2] NARAL Pro-Choice America,[3] American Civil Liberties Union,[4] the Center for Reproductive Rights,[5] Generations Ahead,[6] National Partnership for Women & Families,[7] Physicians for Reproductive Choice and Health,[8] the Reproductive Justice Community,[9] the National Abortion Federation,[10] and a coalition of 14 Asian American and Pacific Islander community organizations.[11]

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[1] 410 U.S. 113 (1973).

[2] Letter from Wade Henderson, President & CEO, & Nancy Zirkin, Executive Vice President, The Leadership Conference on Civil and Human Rights, to Members of the Subcomm. on the Constitution of the H. Comm. on the Judiciary (Dec. 5, 2011) (on file with H. Comm. on the Judiciary, Democratic staff).

[3] The Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act (PRENDA) of 2011: Hearing on H.R. 3541 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong. 184 (2011) (statement for the record submitted by Nancy Keenan, President, NARAL Pro-Choice Am.) [hereinafter H.R. 3541 Hearing].

[4] Written statement from Laura W. Murphy, Dir., Washington Legislative Office, Vania Leveille, Senior Legislative Counsel, & Sarah Lipton-Lubet, Policy Counsel, American Civil Liberties Union, to the Subcomm. on the Constitution of the H. Comm. on the Judiciary (Dec. 6, 2012) (on file with H. Committee on the Judiciary, Democratic staff).

[5] H.R. 3541 Hearing, at 198 (statement for the record submitted by the Center for Reproductive Rights).

[6] *Id.* at 179 (statement for the record submitted by Sujatha Jesudason, Executive Dir., Generations Ahead).

[7] *Id.* at 191 (statement for the record submitted by Debra Ness, President, & Andrea D. Friedman, Director of Reproductive Health Programs, National Partnership for Women & Families).

[8] *Id.* at 189 (statement for the record submitted by Douglas W. Laube, Board Chair, Physicians for Reproductive Choice and Health).

[9] Written Testimony from the Reproductive Justice Community, to H. Comm. on the Judiciary Subcomm. on the Constitution (Dec. 6, 2011) (on file with House Comm. on the Judiciary, Democratic staff) [on behalf of: ACCESS Women's Health Justice, Act for Women & Girls, Alliance for Human Biotechnology, Am. Medical Student Ass'n, Asian Cmtys. for Reprod. Justice (ACRJ), Cal. Latinas for Reprod. Justice, Cal. Black Women's Health Project, Ctr. for Genetics & Society, Ctr. For Reprod. Rights (CRR), Civil Liberties & Pub. Policy, Feminists for Changes (E. Ky. Univ.), Generations Ahead, Jahajee Sisters, Laws Students for Reprod. Justice (LSRJ), Nat'l Asian Pacific Am. Women's Forum (NAPAWF), Nat'l Network for Abortion Funds, Nat'l Latina Institute for Reprod. Health (NLIRH), Our Bodies Ourselves (OBOS), Physicians for Reprod. Choice, Religious Coal. for Reprod. Choice, Reprod. Health Technologies Project (RHTP), SPARK Reprod. Justice NOW, Trust Black Women, & Young Women United].

[10] Written statement from the National Abortion Federation on H.R. 3541 (Dec. 6, 2012) (on file with H. Comm. on the Judiciary, Democratic staff).

[11] H.R. 3541 Hearing, at 196 (letter submitted for the record submitted from Asian & Pacific Islander American Health Forum, Asian Communities for Reproductive Justice, Asian Pacific American Labor Alliance, Asian Pacific Partners for Empowerment, Advocacy and Leadership, Association of Asian Pacific Community Health Organizations, Hmong National Development, Jahajee Sisters, Manavi, National Asian Pacific American Families Against Substance Abuse, National Asian Pacific American Women's Forum, National Queer Asian Pacific Islander Alliance, OCA, Sakhi for South Asian Women, and South Asian Americans Leading Together, to

For these reasons, and those discussed below, we respectfully dissent and we urge our colleagues to reject this seriously flawed bill.

DESCRIPTION AND BACKGROUND

H.R. 3541, as amended, would impose criminal and civil liability on any person who: (1) performs certain abortions at any time during pregnancy if the purpose of such abortion is to terminate a pregnancy on the basis of the fetus' race or sex; (2) uses force (or 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 funds for the performance of a sex-selection abortion or a race-selection abortion, or (4) transports a woman into the United States or to another state for the purpose of obtaining a sex-selection abortion or race-selection abortion. In addition, the legislation imposes criminal liability on medical personnel who suspect there may have been violation of this measure, but fail to report such suspicion to law enforcement officials. Further, it terminates Federal funding for health care providers who violate this measure.

Section 1. Short Title. Section 1 sets forth the short title of the bill as the "Prenatal Nondiscrimination Act (PRENDA) of 2012."

Section 2. Findings and Statement of Constitutional Authority. Section 2 sets forth a series of findings that assert sex or race selection abortions are a form of discrimination on the basis of sex and race.[12] It appears to be intended to lay the groundwork for a direct challenge to the Supreme Court's holding in *Roe v. Wade,* which overruled pre-viability abortion prohibitions.[13] For example, one finding states that "Congress has a compelling interest in acting—indeed it must act—to prohibit sex-selection abortion and race-selection abortion." [14] Section 2 cites as the constitutional authority for this measure the Commerce Clause, and the enforcement clauses of the 13th Amendment to the Constitution (eliminating involuntary servitude), and the 14th Amendment (prohibiting states from "mak[ing] or enforc[ing] 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." [15]

Section 3. Discrimination Against the Unborn on the Basis of Race or Sex. Section 3 amends title 18 of the United States Code to make certain sex- and race-selection abortions a violation of the title's criminal civil rights provisions by adding a new section 250

Rep. Trent Franks, Chairman, and Jerrold Nadler, Ranking Member, Subcomm. on the Constitution of the H. Comm. on the Judiciary (Dec. 6, 2011)).

[12] H.R. 3541, § 2(a)(1)(D) provides: "By definition, sex-selection abortions do not implicate the health of the mother of the unborn, but instead are elective procedures motivated by sex or gender bias." *See also* § 2(a)(2)(C) "By definition, race-selection abortions do not implicate the health of mother of the unborn, but are instead are elective procedures motivated by race bias."

[13] "*With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.* This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." Roe v. Wade, 410 U.S. 113, 163–64 (1973) (emphasis added).

[14] H.R. 3541, § 2(a)(3)(B).

[15] Section 1 of the 14th Amendment also provides for birthright citizenship for all persons born in the United States regardless of the immigration status of their parents. U.S. Const., Amend. 14, § 1.

to chapter 13 of such title. All further references to these new provisions are to proposed section 250.

It is important to note that the bill fails to distinguish between sex selection abortions that are for the purpose of preferring one gender over another and an abortion to avoid the risk of bearing a child with a sex-linked defect, or for any other purpose. Both would be criminalized under the proposed legislation.

Criminal Penalties. Section 250(a) creates four new civil rights crimes, each of which is punishable by a fine, or imprisonment for up to 5 years, or both, for any person who:

(1) "performs an abortion knowing that such abortion is sought based on the sex, gender, color 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 funds for the performance of a sex-selection abortion or a race-selection abortion"; or

(4) "transports a woman into the United States or across a State line for the purpose of obtaining a sex-selection abortion or race-selection abortion."

The fourth item incorporates the same highly controversial provision included in the Child Interstate Abortion Notification Act, which would make it a Federal offense to knowingly transport a minor across a state line, with the intent that she obtain an abortion, in circumvention of a state's parental consent or parental notification law.[16] The penalty for a violation of the law would be a fine or imprisonment for up to 1 year or both.[17]

Civil Cause of Action. Section 250(b)(3) allows a civil action to be brought both for "objectively verifiable money damages for all injuries, psychological and physical, including loss of companionship and support, occasioned by the violation of this section; and punitive damages." And, section 250(b)(4) authorizes injunctive relief.

Section 250(b)(1) authorizes a woman upon whom an abortion has been performed or attempted by someone who "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" to bring an action against that person.

An action may also be brought by the "father of an unborn child" or "a grandparent of the unborn child if the pregnant woman is a minor" against a person who violates the bill's criminal prohibitions, "unless the pregnancy resulted from the plaintiff's criminal conduct or the plaintiff consented to the abortion" pursuant to section 250(b)(1) and (2). While the role of family members in these situations is usually limited to coercion short of the use of 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, this section would allow a birth father or parent of the woman to sue and obtain money damages, for example, against a doctor, even if the former did engage in coercive activity short of the criminal prohibition, or if such conduct was engaged in by close family members.

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[16] H.R. 2299, 112th Cong. (2011).
[17] *Id.* at § 2.

Section 250(b)(4) authorizes an action seeking injunctive relief to be brought by "a woman upon whom an abortion is performed or attempted in violation of this section" or any person who is a spouse or a parent of a woman upon whom an abortion is performed in violation of this section, or the Attorney General of the United States. In addition, section 250(c) provides for the awarding of attorney's fees and costs, but only for a prevailing plaintiff.

Loss of Federal funding. H.R. 3541 treats a violation of its prohibitions as a *per se* violation of section 601 of the Civil Rights Act of 1964, which deals only with discrimination on the basis of race, color, or national origin, but not gender, in any program or activity receiving Federal financial assistance.[18] This provision of the bill, in turn, would trigger section 602 of the Act, which terminates funding for any program violating section 601.[19] The effect of this amendment would be that organizations, such as Planned Parenthood Federation of America and its affiliates, could be targeted. In recent years, these organizations have been falsely accused of accepting donations earmarked to abort African American fetuses. These allegations arise from a series of highly-edited "sting" videos made by Live Action, a discredited organization devoted to attacking progressive organizations through deceptive "undercover" operations.[20]

Section 4. Severability. Section 4 of the bill provides that if any portion of the legislation is invalidated, its remaining provisions must be given full effect.

CONCERNS WITH H.R. 3541

I. H.R. 3541 IS UNCONSTITUTIONAL

The Constitution has recognized that a woman's "right of personal privacy includes the abortion decision."[21] While opponents of this fundamental constitutional right have long sought to overturn or undermine that right, it remains the law of the land four decades later. The Majority has devoted a great deal of time and energy to undermining thus fundamental right in this Congress. In this Congress alone, the Judiciary Committee has met 11 times to consider matters undermining women's constitutionally protected right to control their won bodies.[22] This legislation is simply the latest salvo in the Majority's war on women.

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[18] Section 601 states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (2012).

[19] 42 U.S.C. § 2000d-1 (2012).

[20] Shaila Dewan, To Court Blacks, Foes of Abortion Make Racial Case, The New York Times (Feb. 26, 2010) (*available at* http://www.nytimes.com/2010/02/27/us/27race.html) (*Last visited May 29, 2012).*

[21] Roe v. Wade, 410 U.S. 113, 154 (1973).

[22] No Taxpayer funding for Abortion Act: Hearing on H.R. 3 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong. (2011); Markup of H.R. 3, the "No Taxpayer Funding for Abortion Act," by the H. Comm. on the Judiciary, 112th Cong. (2011); The State of Religious Liberty in the United States: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong. (2011); The Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011: Hearing on H.R. 3541 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong. (2011); Markup of H.R. 3541, the "Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011" by the H. Comm. on the Judiciary, 112th Cong, (2012); Child Interstate Abortion Notification Act: Hearing on H.R. 2299 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong. (2012); Markup of H.R. 2299, the "Child Interstate Abortion Notification Act," 112th Cong. (2012); The District of Columbia Pain-Capable Unborn Child Protection Act: Hear-

Continued

A. H.R. 3541 Prohibits Abortions Prior to Viability.

By imposing a criminal penalty for certain abortions at any point in a pregnancy, the bill crosses a bright line set out by the Supreme Court. It would allow, for the first time since *Roe,* the government to inquire into a woman's motivations for having an abortion, and her deliberations with her health care provider.

In its landmark 1973 decision in *Roe v. Wade,* the Supreme Court struck down pre-viability abortion prohibitions.[23] The Court explained:

> *With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability.* This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justification. If the State is interested in protecting fetal life after viability, it may go as far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[24]

Although the authors of H.R. 3541 attempt to circumvent the Court's bright line rule by stating "Congress has a compelling interest in acting—indeed it must act—to prohibit sex-selection abortion and race-selection abortion,"[25] the fact remains that this legislation proposes a radical change in existing constitutional law. A simple assertion in a legislative finding, however, cannot wipe away decades of critical constitutional protections.

In fact, some proponents of this legislation have publicly admitted that it is intended to undermine, and ultimately overturn, the Supreme Court's *Roe v. Wade* decision. For example, Steven Mosher, who testified at the Constitution Subcommittee hearing on this legislation, has written:

> I propose that we—the pro-life movement—adopt as our next goal the banning of sex- and race-selective abortion. By formally protecting all female fetuses from abortion on ground of their sex, we would plant in the law the proposition that the developing child is a being whose claims on us should not depend on their sex.
>
> Of course, this suggestion is not original with me. It was originally made by the redoubtable Hadley Arkes, who wrote in the pages of First Things in 1994 that "we seek simply to preserve the life of the child who survives the abortion. From that modest beginning, we might go on to restrict abortions after the point of "viability," or we could ban those abortions ordered up simply because the child happens to be a female. We could move in this way, in a train of moderate steps, each one commanding a consensus in the public, and each one tending, intelligibly, to the ulti-

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ing on H.R. 3803 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong. (2012).

[23] Roe v. Wade, 410 U.S. 113 (1973).

[24] *Id.* at 410 U.S. at 163–64 (emphasis added).

[25] H.R. 3541, § 2(a)(3)(B).

> mate end, which is to protect the child from its earliest moments.[26]

It is clear that H.R. 3541 is nothing more than a reckless attempt to override fundamental constitutional protections that have been the law of the United States for nearly four decades.

B. H.R. 3541 Fails To Include the Constitutionally Required Exception To Protect the Health of the Woman

Although H.R 3541 includes an exception to "save the life or preserve the health of the unborn child," [27] it fails to include the constitutionally required exception to protect the life and health of the woman.[28] The Supreme Court in *Roe* was unequivocal: "A . . . criminal abortion statute . . . that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment." [29] In a companion case, the Court clarified that "health" includes both physical and emotional health. It observed:

> [T]he medical judgment may be exercised in the light of all factors-physical, emotional, psychological, familial, and the woman's age-relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.[30]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey* the Court reaffirmed this rule, explaining that any prohibition must make an exception for where an abortion "is necessary, in appropriate medical judgement, for the preservation of the life or health" of the woman.[31]

By failing to include the women's health exception, H.R. 3541 violates long established constitutional protections and jeopardizes the lives of women.

II. SUPPORTERS OF H.R. 3541 WRONGLY SUGGEST THAT THE LEGISLATION FURTHERS THE STRUGGLE AGAINST RACISM AND SEXISM

We find it especially disturbing that the title of the bill, as introduced, invokes the names of Susan B. Anthony and Frederick Douglass in support of the argument that eliminating a woman's right to choose furthers the legacy of those great civil rights leaders. In fact, despite the heated rhetoric, there is no historical basis for asserting that these civil rights giants would have supported the legislation. The repeated assertions that a woman's right to choose is an attack on communities of color and on women, is likewise false.

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[26] Steven W. Mosher, A New Front in the Abortion Wars: PreNDA Seeks Race and Sex-based Equality for the Unborn, 18 PRI Review (Nov./Dec. 2008) *available at* http://www.pop.org/content/a-new-front-in-abortion-wars-prenda-seeks-1602 (last visited Dec. 5, 2011).

[27] H.R 3541, § 4 (creating a new 18 U.S.C. 250(g)(1)).

[28] H.R. 3541 does provide exceptions to "remove a dead unborn child caused by spontaneous abortion" and to "remove an ectopic pregnancy"). *Id.* (creating a new 18 U.S.C. 250(g)(2) & (3)).

[29] *Roe* at 164.

[30] Doe v. Bolton, 410 U.S. 179, 192 (1973).

[31] 505 U.S. 833, 879 (1992) (quoting Roe v. Wade) (citations omitted).

A. H.R. 3541 Relies on the Unfounded Canard that Legalized Abortion Is Both Sexist and Racist

We strenuously oppose the invocation of Susan B. Anthony and Frederick Douglass in support of this anti-woman, unconstitutional legislation. Indeed, the author of this bill went so far as to claim that this legislation was needed because legalized abortion "far outpaces the death caused even in the days of slavery."[32] Representative Ted Deutch (D–FL) expressed our concerns in his response:

> [I]t must be said that to compare the number of abortions to the number of slaves who were killed is to equate women exercising their constitutional rights to the slave masters and those who killed the slaves. That is not acceptable.[33]

Ranking Member John Conyers, Jr. (D–MI) observed, "as one who has perhaps studied and appreciated Frederick Douglass as much as anyone on the committee, I have not been able to discover what his name on this bill and his connection to it are."[34] Accordingly, to rectify this egregious flaw in the bill, he offered an amendment to strip the names of Frederick Douglass and Susan B. Anthony from the bill's short title. After extensive debate on this issue and a break in the markup, the amendment was adopted on a vote of 24 to 1.[35]

Proponents of the legislation rely on statistics that communities of color have higher rates of abortion than the general population. These statistics do not demonstrate that legalized abortion is a form of racism, but rather that to the extent that these communities have been historically underserved in the types of services that prevent unwanted pregnancies. The fault lies not with the availability of abortion services, but rather with the distorted policies that make that option far more necessary. As Ranking Member Conyers explained:

> The African-American and Hispanic communities are underserved when it comes to prenatal care and maternal and child health care services. African-Americans have shorter life spans, higher infant mortality rates, higher rates of low birth weight babies. By every measure our community is medically underserved, and the outcomes only reinforce that. And so, those are the issues I would like to direct our attention toward, and I think that in some ways the measure before us signifies an important retreat from civil rights initiatives.[36]

The facts are indeed sobering. African American women are already three to four times more likely to die from pregnancy related

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[32] Unofficial Tr. of Markup of H.R. 3541 by the H. Comm. on the Judiciary, 112th Cong. 34 (Feb. 8, 2012) (comments of Representative Trent Franks) [hereinafter Markup Transcript].
[33] *Id.* at 53.
[34] *Id.* at 18.
[35] Representative Steven King (R–IA) cast the sole no vote. *Id.* at 39.
[36] Markup Transcript at 19 (comments of Representative John Conyers, Jr.).

causes than White women,[37] and their unintended pregnancy rate is 67% compared to 40% for White women.[38]

Some anti-choice advocates have taken the position that Planned Parenthood and other providers are inherently racist. For example, one of these organizations asserts the following:

> Planned Parenthood is the largest abortion provider in America. Seventy-eight percent of their clinics are in minority communities. Blacks make up 12% of the population, but 35% of the abortions in America. Are we being targeted? Isn't that genocide? We are the only minority in America that is on the decline in population. If the current trend continues, by 2038 the Black vote will be insignificant. Did you know that the founder of Planned Parenthood, Margaret Sanger, was a devout racist who created the Negro Project designed to sterilize unknowing Black women and others she deemed as undesirables of society? The founder of Planned Parenthood said, "Colored people are like human weeds and are to be exterminated." Is her vision being fulfilled today? [39]

Dr. Martin Luther King, Jr., however, took a different view of this issue. He strongly supported the work of Ms. Sanger and emphasized the importance of access to family planning resources for African Americans. On accepting the Margaret Sanger Award from Planned Parenthood in 1966, Dr. King stated:

> There is a striking kinship between our movement and Margaret Sanger's early efforts. She, like we, saw the horrifying conditions of ghetto life. Like we, she knew that all of society is poisoned by cancerous slums. Like we, she was a direct actionist—a nonviolent resister. She was willing to accept scorn and abuse until the truth she saw was revealed to the millions. At the turn of the century she went into the slums and set up a birth control clinic, and for this deed she went to jail because she was violating an unjust law. Yet the years have justified her actions. She launched a movement which is obeying a higher law to preserve human life under humane conditions. Margaret Sanger had to commit what was then called a crime in order to enrich humanity, and today we honor her courage and vision; for without them there would have been no beginning. Our sure beginning in the struggle for equality by nonviolent direct action may not have been so resolute without the tradition established by Margaret Sanger and people like her. Negroes have no mere academic nor ordinary interest in family planning. They have a special and urgent concern.[40]

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[37] U.S. Department of Health and Human Services Office on Women's Health, Pregnancy Related Death (May 18, 2010), *available at* http://www.womenshealth.gov/minority-health/african-americans/pregnancy.cfm.

[38] 5 Guttmacher Institute, Facts on Induced Abortion in the United States (Aug. 2011), *available at* http://www.guttmacher.org/pubs/fb__induced__abortion.html.

[39] L.E.A.R.N. Northeast (part of the Life Education And Resource Network), PLANNED PARENTHOOD, *available at* http://blackgenocide.org/planned.html (last visited May 27, 2012).

[40] Rev. Martin Luther King Jr., Family Planning—A Special and Urgent Concern: Speech Accepting the Margaret Sanger Award (1966) *available at* http://www.plannedparenthood.org/about-us/who-we-are/reverend-martin-luther-king-jr-4728.htm.

In response to a billboard campaign in her district linking family planning with racism, Representative Barbara Lee (D–CA) observed:

> I am deeply offended by the race-based billboards that are being displayed in my congressional district by the Radiance Foundation and Issues4Life. . . . These billboards stigmatize women of color and perpetuate myths about parenting skills and the types of women who seek and use abortion services. I have and will continue to believe that women have the fundamental rights to make decisions regarding their reproductive lives, and *no woman's choice should be subjected to scrutiny based on her ethnic background.* [41]

It is therefore not surprising that every leading civil rights organization rejects any assertion that this legislation furthers the cause of civil rights. In a letter to the Members of the Committee, the Leadership Conference on Civil and Human Rights, a coalition of more than 200 civil rights organizations, stated:

> Women and their families continue to bear the negative consequences of persistent sex and race discrimination. Yet, despite its lofty title, HR. 3541 does nothing to address the causes or pernicious effects of such discrimination . . . we must oppose H.R. 3541, which does nothing to address ongoing discrimination.[42]

We strongly concur with these civil rights leaders and likewise reject the sponsors' absurd assumption that legalized abortion is racist.

III. H.R. 3541 DOES NOTHING TO DEAL WITH THE PROBLEM OF SON PREFERENCE AND THE PRESSURES WOMEN SOMETIMES EXPERIENCE TO PREFER A SON

The preference for male children is a real if limited phenomenon in the United States. Some women face familial and community preference to have male children, and that pressure can increase with each subsequent birth.

While H.R. 3541 cites the United Nations Commission on the Status of Women as urging governments to prevent sex selective abortions,[43] it ignores the concerns expressed by others in the international community—such as the United Nations Population Fund, the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund, United Nations Women, and the World Health Organization—that abortion restrictions are not the solution because they put women's health and lives in jeopardy and violate women's human and reproductive rights.[44]

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[41] Press Release, Congresswoman Barbara Lee Responds to Billboards that Attack a Woman's Right to Choose (June 17, 2011) (emphasis added), *available at* http://lee.house.gov/press-releases/congresswoman-barbara-lee-responds-to-billboards-that-attack-a-womans-right-to-choose/.

[42] Letter from Wade Henderson, President & CEO, & Nancy Zirkin, Executive Vice President, The Leadership Conference on Civil and Human Rights, to Members of the Subcomm. on the Constitution of the H. Comm. on the Judiciary (Dec. 5, 2011) (on file with H. Comm. on the Judiciary, Democratic staff).

[43] H.R. 3541, § 2(a)(1)(H).

[44] Office of the High Commissioner for Human Rights *et al.,* Preventing Gender-Biased Sex Selection: An Interagency Statement, World Health Organization, at 7 (2011).

The Minority witness who testified at the hearing on H.R. 3541, Miriam Yeung, of the National Asian Pacific American Women's Forum (NAPAWF), discussed how Congress could address male child preference issue in a manner that is effective and that supports women rather than stigmatizing them. She explained:

> As an organization that represents Asian American and Pacific Islander women, NAPAWF is extremely concerned that the anti-choice movement is exploiting the issue of son preference in some Asian cultures while doing nothing to support efforts that truly address the issue. It is true that a few studies point to the practice of son preference among Chinese-, Indian-, and Korean-American families with more than one child, with results most pronounced for families with two or more children. Researchers are quick to note that this problem is far from widespread. Because of the low fertility rate in the United States, and because those API ethnicities make up less than two percent of the total US population, this phenomenon would in no way result in the skewed sex ratios that cause concern in Asia.
>
> Son preference is a symptom of deeply rooted social biases and stereotypes about gender. Gender inequity cannot be solved by banning abortion. The real solution is to change the values that create the preference for sons. Asian American and Pacific Islander women's organizations know this and are working on this problem in culturally competent ways that provide long-term, sustainable solutions. We are working with members of our own community to empower women and girls, thereby challenging norms and transforming values. For example, we are carrying out programs that build the leadership capacity of women, improve their economic standing, create better access to healthcare for them, and lower the rates of gender-based violence against them. Instead of supporting us in this work, proponents of this bill ignore what Asian American and Pacific Islander women know is best for our own community and undermine our agency by trying to curb our rights.[45]

In an effort to address these concerns in a constructive and constitutionally sound manner Democratic Members offered a series of amendments, all of which were rejected by the Majority. For example, Representative Mike Quigley (D–IL) offered an amendment in response to concerns voiced by the sponsors of this bill that women were the targets of violence in an effort to force them to abort female fetuses. His amendment would have delayed the bill's effective date until the Violence Against Women Act[46] was fully funded at the authorized level for two consecutive fiscal years. The amendment failed by a vote of 9 to 16.

Representative Jerrold Nadler (D–NY) offered an amendment that would have made it a crime to coerce a woman either to have

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[45] Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011: Hearing on H.R. 3541 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 112th Cong. 68 (2011) (testimony of Miriam Yeung) (citations omitted).

[46] Pub.L.No. 103–322, 108 Stat. 1796 (1994).

or not to have an abortion under any circumstances. This amendment was rejected by a vote of 10 to 18. Representative Nadler also offered an amendment that would have authorized a study into discriminatory practices against pregnant workers. That amendment was rejected by a vote of 12 to 19.

IV. H.R. 3541 VIOLATES THE DOCTOR-PATIENT RELATIONSHIP AND ADVERSELY IMPACTS THE PRACTICE OF MEDICINE

H.R. 3541, by introducing civil and criminal penalties, will make it more difficult, and in some cases impossible, for health care providers to exercise the professional obligations to their patients and to the practice of medicine.

The Supreme Court, in *Roe v. Wade,* recognized the critical role of the doctor-patient relationship and why medical judgments should be unfettered by governmental intrusion. It explained:

> [T]he right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.[47]

H.R. 3541, on the other hand, would force health care providers to inquire into a woman's reasons for seeking abortion services. Physicians would have to consider whether women seeking routine non-abortion services, such as determining the sex of the fetus, would then use that information in deciding whether to continue a pregnancy.

The bill's findings purport to suggest the legislation has the support of the medical profession. On the contrary, H.R. 3541 distorts the views of the American Society for Reproductive Medicine so flagrantly, that the organization sent a letter to the bill's author, Constitution Subcommittee Chairman Franks, asking him to correct the record. The Society wrote:

> [t]he bill would make illegal the use of elective pregnancy termination in certain circumstances. Our report however is limited to a specific family building treatment modality, and does not address pregnancy termination. We feel it is inappropriate to use the conclusions about sex selection during a family building process in the context of a discussion about pregnancy termination. We would ask you to correct this misrepresentation of our report in the bill.[48]

Despite this request, Representative Franks declined to correct the findings included in the bill.

The bill's findings section also selectively quotes an ethics opinion by the American College of Obstetricans and Gynecologists. In fact, it omits the sentence of the opinion, which states that such

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[47] Roe, 410 U.S. at 166.

[48] Letter from Robert W. Rebar, Executive Director, American Society for Reproductive Medicine, to Rep. Trent Franks, Chairman, Subcomm. on the Constitution of the H. Comm. on the Judiciary (Dec. 20, 2011) (on file with the H. Comm. on the Judiciary, Democratic staff).

abortions are, under certain circumstances, "ethically permissible."[49] Nor does the bill quote the part of the opinion that states:

> Medical techniques intended for other purposes have the potential for being used by patients for sex selection without the health care provider's knowledge or consent. Because a patient is entitled to obtain personal medical information, including information about the sex of her fetus, it will sometimes be impossible for health care professionals to avoid unwitting participation in sex selection.[50]

Given the severe civil and criminal penalties doctors face under this bill, that observation should give everyone—including the sponsors of this bill—pause. Doctors would be forced to police their patients, read their patients' minds, and conceal information from their patients. The failure to fulfill any of these requirements would put such medical professionals at risk of prosecution and suit.

To address this shortcoming in the bill, Representative Sheila Jackson Lee (D–TX) offered an amendment reaffirming the American Medical Association's Code of Medical Ethics Opinion 5.059, which states:

> Physicians must seek to protect patient privacy in all of its forms, including (1) physical, which focuses on individuals and their personal spaces, (2) informational, which involves specific personal data, (3) decisional, which focuses on personal choices, and (4) associational, which refers to family or other intimate relations. Such respect for patient privacy is a fundamental expression of patient autonomy and is a prerequisite to building the trust that is at the core of the patient-physician relationship.

This amendment, however, failed. By rejecting this amendment, the Members who support this legislation also reject the fundamental ethical duty that physicians owe to their patients—and which would be nullified by this legislation.

CONCLUSION

Rather than addressing the very real problems women face, H.R. 3541 would destroy the doctor-patient relationship by requiring health care providers to police their patients. This legislation represents another assault on the autonomy of American women and the protections they have under the Constitution. It is worth noting that, despite wrapping this legislation in the language of the civil rights movement, many of the bill's leading proponents have opposed the reauthorization of the Voting Rights Act,[51] have worked to undermine key protections for women such as the Violence Against Women Act,[52] and opposed the Lilly Ledbetter Fair Pay Act of 2009.[53] Perhaps most importantly, H.R. 3541 could provide a legal basis for overturning *Roe v. Wade* and nearly four decades

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[49] American College of Obstetricians and Gynecologists, Committee on Ethics, Opinion No. 360 (Feb. 2007, *reaff'd.* 2008).

[50] *Id.*

[51] Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub.L.No. 109–246, 120 Stat. 577 (2006).

[52] Pub.L.No. 103–322, 108 Stat 1796 (1994).

[53] Pub. L. No. 111–2, 123 Stat. 5 (2009).

of its progeny that have recognized the right of all women to control their own reproductive decisions.

It is especially disturbing that this bill (as originally introduced) sought to invoke two of our Nation's greatest civil rights leaders and the causes for which they heroically struggled as justification for the need of this legislation, when, in fact, H.R. 3541 would undo constitutional protections for the rights of women. This legislation is an insult to the memory of these civil rights leaders and their accomplishments, and to those who have struggled, and at times died, in the cause of liberty and equality.

Even under its amended title, H.R. 3541 remains an insult to American women. The bill utterly fails to do anything to assist women in need and does not include a single provision that would promote their health or safety. Instead, it is a paternalistic measure that asserts that the supporters of H.R. 3541 are in a better position than health care professionals to make life and death decisions for women.

For these reasons, we must respectfully dissent.

JOHN CONYERS, JR.
JERROLD NADLER.
ROBERT C. "BOBBY" SCOTT.
MELVIN L. WATT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
STEVE COHEN.
HENRY C. "HANK" JOHNSON, JR.
MIKE QUIGLEY.
JUDY CHU.
TED DEUTCH.
JARED POLIS.

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