Appeal No. 13-17247

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

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

BRIEF OF *AMICUS CURIAE* BLACK WOMEN'S HEALTH IMPERATIVE IN SUPPORT OF PLAINTIFFS-APPELLANTS

Courtney Christian
BLACK WOMEN'S HEALTH IMPERATIVE
726 M Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 548-4000

Jonathan M. Cohen
Counsel of Record
Mark A. Packman
Kami E. Quinn
Jenna A. Hudson
Michelle A. Price
Kristiné M. Hansen
GILBERT LLP
1100 New York Avenue, N.W.
Suite 700
Washington, D.C. 20005
(202) 772-2259
cohenj@gotofirm.com

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Court Filings

Statutes

Rules

Other Authorities

STATEMENT OF *AMICUS CURIAE*

Amicus curiae Black Women's Health Imperative (the "Imperative") is the only organization in the United States devoted solely to advancing the health of this country's 20 million Black women through advocacy, health education, research, and leadership development. The Imperative seeks to eliminate the undue health burdens that Black women face.

In the reproductive justice context, the Imperative focuses on how history and the inequalities and complexities in the lives of Black women profoundly impact their healthcare decision making. Black women historically have been unjustly denied their basic reproductive rights by destructive means such as coerced sterilization, court-ordered birth control enforcement, punitive welfare policies, and deadly illegal abortions. Even today, lingering stereotypes and social, political, and economic conditions adversely impact Black women's reproductive decisions.

The Imperative has an interest in this case because Arizona's Susan B. Anthony and Fredrick Douglas Prenatal Nondiscrimination Act of 2011, Ariz. Rev. Stat. Ann. §§ 13-3603.02, 36-2157 (the "Act")

draws on and perpetuates stereotypes about Black women in Arizona by requiring their doctors to interrogate them on the bases for their decision to exercise their reproductive rights. This requirement stigmatizes Black woman and exacerbates the adverse social, political, and economic conditions that Black women already face in attempting to exercise these rights. Because the Imperative seeks to eliminate undue and unequal health burdens, it supports Plaintiffs' challenge to the Act.[1]

All parties have consented to the filing of this brief, as required under Federal Rule of Appellate Procedure 29(a). In accordance with Federal Rule of Appellate Procedure 29(c)(5), the Imperative affirms that neither the parties nor their counsel had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief.

[1] The Imperative also supports Plaintiffs' challenge to the Act's discrimination against the Asian and Pacific Islander women of Arizona. However, this brief addresses only the injury that Black women sustain from the Act because the Imperative focuses on health issues that impact Black women.

ARGUMENT

The Act requires any doctor who performs an abortion in Arizona to complete an affidavit (which will be added to the patient's medical file) affirming that the patient is not seeking an abortion based on the race or gender of the fetus. *See* Ariz. Rev. Stat. Ann. § 36-2157. Plaintiffs allege (and the Imperative agrees) that the Act (1) rests on stereotypes rather than fact and (2) stigmatizes Black women in violation of their right to equal protection. The experiences of Black women exercising their reproductive rights demonstrate that this stigmatic harm confers standing because it personally injures Plaintiffs, the members of the Imperative, and other Black women who have sought and will seek abortions in Arizona.

I. Members Of A Group Are Personally Injured By, And Thus Have Standing To Challenge, A Statute That Codifies Stereotypes About That Group In Their Community

Stigma is "one of the most serious consequences of discriminatory government action and is sufficient . . . to support standing [for] 'those who are personally denied equal treatment' by the challenged discriminatory conduct." *Allen v. Wright*, 468 U.S. 737, 755 (1984) (citing *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984)). "By perpetuating 'archaic and stereotypic notions' or by stigmatizing

members of the disfavored group as 'innately inferior,'" discrimination "can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler*, 465 U.S. at 739-40.

Thus, while a mere allegation that governmental action is inconsistent with plaintiffs' values will not confer standing, under *Allen*, "stigmatic injury caused by racial discrimination could support standing . . . if the plaintiffs personally ha[ve] been or [are] likely to be subject to the challenged discrimination." *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 785 n.5 (9th Cir. 2008). Litigants "personally ha[ve] been or [are] likely to be subject to the challenged discrimination," *id.*, when a regulation in their community "impos[es] a badge or label of inferiority" based on the race or other "distinct group of which [they are] a part." *Smith v. City of Cleveland Heights*, 760 F.2d 720, 722, 723 (6th Cir. 1985) (citation omitted).

Thus, for example, in *Smith*, the Sixth Circuit found that a Black resident had standing to challenge his community's housing program that limited the population to no more than 25% Black families because he was personally injured by "shouldering the burden of belonging to a

race disfavored for purposes of the[] City's housing policies." *Id.* Similarly, in *Awad v. Ziriax*, 670 F.3d 1111, 1120, 1123 (10th Cir. 2012), the Tenth Circuit found that a Muslim man had standing to challenge a constitutional amendment that he alleged condemned his religion in his state.

And, in *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010), this Court found that Catholics in San Francisco had standing to challenge a municipal resolution that they alleged stigmatized Catholics. Most recently, this Court held that a law that defined marriage as between a man and a woman sent a public message that gays and lesbians are lesser and that "[t]his government-sponsored message was in itself a harm of great constitutional significance." *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 482 (9th Cir. 2014).

Notwithstanding these clear precedents, the District Court concluded that the Act does not personally injure Black women in Arizona who have or in the future may seek abortions in the state. Order, ER 002-013. As discussed below, however, the Act inflicts, or is

"likely to" inflict, *Barnes-Wallace*, 530 F.3d at 785 n.5, a very real and personal injury on Black women in Arizona.

II. The Act Personally Injures Black Women In Arizona By Codifying Stereotypes About Them In Their Community

The legislative history of the Act makes clear that the Arizona legislature relied entirely on long-standing stereotypes that Black women are too ignorant or immoral to exercise their reproductive rights responsibly. These stereotypes continue to impact Black women's exercise of the their reproductive rights to this day, and the Act's requirement that doctors pry into their patients' motivations causes, or is likely to cause, real, personal injury to Black women in Arizona.

A. The Act Codifies And Perpetuates The Stereotype That Black Women Are Too Ignorant Or Immoral To Make Responsible Reproductive Choices

In drafting and debating the Act, its proponents "focused exclusively on the reported rates of abortion among Black women" as evidence that Black women are engaging in race-selective abortions. Compl., ER 023 ¶ 29.[2] The legislature made no attempt "to link the

[2] As Plaintiffs note, legislative and administrative history is relevant to equal protection claims, particularly when the racial classification is not apparent from the face of the statute in question. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) ("The legislative or administrative history may be highly relevant [to proving

rate or number of abortions among white women, or women of any race except Black women, to so-called race-selection abortions." Compl., ER 024 ¶ 32, ER 025 ¶ 33. Nor did the Arizona legislature identify any woman in Arizona who had or attempted to have an abortion for the purpose of reducing the Black population in Arizona or nationwide. Compl., ER 025 ¶ 38.

Indeed, higher rates of abortion among Black women result not from such a purpose, but rather from higher rates of unintended pregnancy among Black women, which the Imperative works to remedy, and which result from "a long history of discrimination; lack of access to high-quality, affordable health care; too few educational and professional opportunities; unequal access to safe, clean neighborhoods; and, for some African Americans, a lingering mistrust of the medical community." Melissa Gilliam, Op-Ed, *Health-Care Inequality Is Key In Abortion Rates*, The Phila. Inquirer, Aug. 10, 2008, http://www.guttmacher.org/media/resources/2008/08/10/Gilliam_op-ed.pdf; *see also Unintended Pregnancy in the United States*, Guttmacher Inst. (Dec.

---

an equal protection claim], especially where there are contemporary statements by members of the decision[-]making body, minutes of its meetings, or reports.").

2013), http://www.guttmacher.org/pubs/FB-Unintended-Pregnancy-US.html; Christine Dehlendorf, *et al.*, *Disparities in Family Planning*, 202 Am. J. of Obstetrics & Gynecology 214 (2010); The Henry J. Kaiser Family Found., *Putting Women's Health Care Disparities on the Map: Examining Racial and Ethnic Disparities at the State Level* (2009), *available at* http://kaiserfamilyfoundation.files.wordpress.com /2013/01/7886.pdf. In addition, a higher percentage of Black women lack access to contraceptives, which statistically leads to higher rates of unintended pregnancy. *See generally* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, 11 Guttmacher Pol'y Rev., Summer 2008, at 2, *available at* http://www.guttmacher.org/pubs/gpr/ 11/3/gpr110302.html.

Yet, the Arizona legislature simply assumed that the correlation between race and abortion rates resulted from a "plot by some abortion providers to eliminate the Black race" and that "Black women were too foolish to resist such a plot." Compl., ER 025 ¶ 34. Proponents "took the position that the race-selection ban was necessary to protect Black women from their weak-mindedness in failing to resist those who seek to reduce or eliminate the Black race." Compl., ER 025 ¶ 36. The

Arizona legislature did not proffer any evidence or testimony identifying why Black women, unlike other women, would be susceptible to plots to eliminate the Black race. Compl., ER 025 ¶ 36.[3]

Unfortunately, the Act does not represent the first time that laws have been used to restrict the reproductive freedoms of Black women. When Black women were enslaved, they, of course, had no such freedoms. *See generally* Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 33 (1997) (hereinafter "Killing") (citing *Banks' Administrator v. Marksberry*, 3 Litt. 275, 13 Ky. 275 (1823)). And Black women and their children were stigmatized by the laws of many states which provided that children with slave mothers and white fathers were slaves. Killing at 23, 29.

Even emancipation did not bring reproductive freedom. Instead, numerous states passed laws designed to control and stigmatize Blacks and their reproductive decisions. States enacted anti-miscegenation statutes, and some states, such as Alabama, added provisions to their state constitutions to guarantee that "[t]he legislature shall never pass

[3] Plaintiffs' allegations must be accepted as true for the purpose of determining whether there is standing. *See Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 104 (1998).

any law to authorize or legalize any marriage between any white person and a Negro or descendant of a Negro." R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 857 (2004). It was not until 1967 that the U.S. Supreme Court in *Loving v. Virginia*, 388 U.S. 1 (1967), found that these statutes "had a deeply stigmatizing effect on African Americans that persists today," 79 N.Y.U. L. Rev. at 857, and held that they were unconstitutional.

To make matters worse, in the first decade of the twentieth century, twelve states passed involuntary mandatory sterilization laws that, in practice, primarily targeted Black people. Killing at 67. Government-funded doctors continued sterilizations even after states repealed involuntary sterilization laws. In the 1930s and 1940s, the North Carolina Eugenics Commission sterilized 8,000 "mentally deficient persons," including 5,000 Black persons. Killing at 90. In 1954, all of the people sterilized at the South Carolina State Hospital were Black women. Killing at 89-90. "[T]eaching hospitals performed unnecessary hysterectomies on poor Black women as practice for their medical residents. This sort of abuse was so widespread in the South that these operations came to be known as 'Mississippi

appendectomies.'" Killing at 90. The doctors who performed these surgeries later said that they thought sterilization would help stem population growth; one chief of surgery explained that "a girl with lots of kids, on welfare, and not intelligent enough to use birth control, is better off being sterilized." Killing at 92. "[N]ot intelligent enough to use birth control . . . is often a code phrase for 'black' or poor." Killing at 92 (quoting Gena Corea, *The Hidden Malpractice: How American Medicine Treats Women as Patients and Professionals* 181 (Morrow 1973)). From the 1960s to the early 1970s, between 50,000 and 75,000 Black women were sterilized each year, often with federal funds. *Relf v. Weinberger*, 372 F. Supp. 1196, 1199 (D.D.C. 1974), *vacated on other grounds*, 565 F.2d 722 (D.C. Cir. 1977); Killing at 93. Black women were often "improperly coerced into accepting a sterilization operation under the threat that various federally supported welfare benefits would be withdrawn unless they submitted to irreversible sterilization." *Relf*, 372 F. Supp. at 1199.

Since the legalization of abortion, opponents of Black women's reproductive rights have had to seek other means to apply the stereotype that Black women are too ignorant or immoral to exercise

their reproductive rights. Most recently, anti-abortion groups have done so by "selectively co-opting civil rights rhetoric" to make limitations on Black women's free exercise of their reproductive rights appear to support – rather than discriminate against – Black women. *See* Kathryn Joyce, *Abortion as "Black Genocide:" An Old Scare Tactic Re-emerges*, Public Eye, Apr. 29, 2010, *available at* http://www.publiceye.org/magazine/v25n1/abortion-black-genocide.html. The Act reflects this trend by appropriating the names of two well-known civil-rights activists who have no connection to the actual purpose of the Act. *See GOP's New Civil Rights Concerns Ring Hollow*, USA Today, Dec. 8, 2011, http://usatoday30.usatoday.com/USCP/PNI/NEWS/2011-12-08-PNI1208opi-milbankPNIBrd_ST_U.htm.

Yet, far from promoting the civil rights of Black women or their fetuses, the Act discriminates Arizona's Black women by perpetuating negative stereotypes and thus injuring Black women, as discussed below.

B. By Codifying The Stereotype That Black Women Are Too Ignorant Or Immoral To Make Reproductive Choices, The Act Injures Black Women In Arizona

Black women in Arizona, including Plaintiffs' and the Imperative's members, suffer, or are likely to suffer, real and immediate injury because of the Act. Decisions surrounding family planning and whether to terminate a pregnancy are difficult and stressful enough, and for Black women, these decisions are made against the backdrop of the history of racial discrimination in reproductive matters and continued stereotype that they are too ignorant or immoral to exercise their rights. By requiring doctors in Arizona to interrogate their patients' decisions to seek an abortion, the Act endorses – and thus amplifies the harm caused by – this stereotype. *Cf. SmithKline*, 740 F.3d at (finding that a law that defined marriage as between a man and a woman sent a public message that gays and lesbians are lesser and that "[t]his government-sponsored message was in itself a harm of great constitutional significance").

That Black women are personally injured by stereotypes regarding the exercise of their reproductive rights (including those perpetuated by the Act) is confirmed by Black women's experiences at

every stage of the reproductive decision-making process – from the messages they see in public to what they encounter when seeking health care.

First, Black women are personally and negatively affected by race-based anti-choice propaganda. "These types of advertisements make black women out to be the victims who are too lazy or too stupid to make the right choice, instead of women with power (and sense) enough to know what is right for them." Britni Danielle, *Controversial Anti-Abortion Ad Targets Black Women, Blames Planned Parenthood*, Clutch Magazine, Dec. 23, 2010, at 2. And many of these messages espouse abortion restrictions in the guise of advocating civil rights. For example, in 2010, a billboard proclaiming "Black Children are an Endangered Species" appeared to encourage support for a bill that resembles the Act. Sister Song, *Race, Gender and Abortion: How Reproductive Justice Activists Won in Georgia*, Sister Song (2010), *available at* http://www.trustblackwomen.org/SisterSong_Policy_Report.pdf. And these messages start at a young age; for example, at a Raleigh, North Carolina high school, a pro-life and pro-abstinence ministry group distributed different pamphlets to members of different

races. This messaging stigmatized Black students because "the message was [not] promoted across the board [but instead] by race." Elaina Athans, *Anti-Abortion Rally Targets Students' Race*, ABC11 EyeWitness News, Nov. 6, 2013, *available at* http://abclocal.go.com/wtvd/story?section=news/local&id=9316072.

Second, Black women are subject to injury when they actually attempt to access reproductive services, such as when protestors attempt to prevent access to abortion clinics and to force providers to close.

> [A] protester there . . . used particularly racial terms when shouting at women of color who were entering the building where the clinic is located (there are other businesses in the building, so women are going in for things other than reproductive health services quite often). I heard her shout at a pair of African[-]American women as they were going in that they were participating in "womb lynching." That was the phrase she used. I'd also heard her shout the question "Where have all the black babies gone" as women of color walk toward the doors. [M]ultiple protesters [are] telling women of color that they (the protesters) are there to speak out "just like Dr. King," as they see themselves as the next wave of civil rights pioneers. Notably, they don't say that to white patients.

Email from Samantha Griffin, Program Associate, Black Women's Health Imperative, to Courtney Christian, Director of Policy and

Advocacy, Black Women's Health Imperative (Mar. 11, 2014) (on file with *amicus curiae*).

When Black women actually make it inside the clinic or physician's office, they continue to face racial discrimination.

> They sent a black woman in to talk to me. She told me that she and her husband hadn't wanted their child at first and tried to convince me to keep mine. Then they showed me a video of a D&E (dilation and evacuation). They assumed I was on food stamps. At that time, I didn't know how to articulate why that was offensive. . . . They sent me home with a rattle and a onesie.

Meaghan Winter, *My Abortion: One in Three Women Has an Abortion by the Age of 45. How Many Ever Talk about it? New Laws, Old Stigmas. 26 Stories.* New York Magazine, Nov. 10, 2013, at 3.

> The hardest part about having an abortion was the stigmatizing environment in which I was having it. . . . The doctor's comment about my being articulate meant he had made some assumptions about me, (and other women who sat straddling his head full of curls). What the implications of those assumptions are I didn't know but it felt unnerving.

Shanelle Matthews, *The Story that's Taken Ten Years to Tell: On Abortion, Race, and the Power of Story*, Crunk Feminist Collective (last visited Mar. 19, 2014) http://www.crunkfeministcollective.com/2013/01/22/the-story-thats-taken-ten-years-to-tell-on-abortion-race-and-the-power-of-story/.

Black women continue to feel stigmatized because of their race long after they have made a reproductive health decision.

> My Blackness makes my story all the more problematic for some people. The assumptions that are made about Black women's reproductive decisions mean that I will receive less compassion and acceptance than my white counterparts for having had an abortion – especially because I'm not repentant about it.

Id.

Now, under the Act, doctors in Arizona are required to interrogate their Black patients regarding the bases for their decision to end their pregnancies. This requirement exacerbates the existing impact of stereotypes on Black women's exercise of their reproductive rights, and potentially chills the relationship between Black women and their doctors in Arizona. *See Singleton v. Wulff*, 428 U.S. 106, 110 (1976) (acknowledging that restrictions on a woman's right to determine whether to bear a child potentially could "chill and thwart the ordinary and customary functioning of the doctor-patient relationship").

These stories reaffirm that Black women in Arizona are personally harmed or are likely to be harmed by the stereotype that they are too ignorant or immoral to exercise their reproductive rights. That the Act

codifies and perpetuates this stereotype confirms that the Act injures Black women in Arizona for the purpose of standing.

CONCLUSION

The Act is built entirely on stereotypes and misconceptions about how Black women exercise their reproductive rights, and the government's endorsement of those stereotypes personally harms or likely will harm Black women who have sought and will seek abortions in Arizona, including Plaintiffs' and the Imperatives' members. Plaintiffs therefore have standing, and this Court should remand to the District Court of Arizona for a determination on the merits.

March 19, 2014

Respectfully submitted,

Courtney Christian
BLACK WOMEN'S HEALTH IMPERATIVE
726 M Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 548-4000

Jonathan M. Cohen
Counsel of Record
Mark A. Packman
Kami E. Quinn
Jenna A. Hudson
Michelle A. Price
Kristiné M. Hansen
GILBERT LLP
1100 New York Ave., N.W.
Suite 700
Washington, D.C. 20005
(202) 772-2259
cohenj@gotofirm.com

Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE
WITH FEDERAL APPELLATE RULE 32

As required by Federal Appellate Rule 32(a)(7)(B), I declare that the Brief of *Amicus Curiae* Black Women's Health Imperative In Support of Plaintiffs-Appellants in Case No. 13-17247 contains 3,409 words, excluding parts of the document that are exempted by Federal Appellate Rule 32(a)(7)(B)(iii).

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

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

Executed on the 19th day of March, 2014.

/s/ Jonathan M. Cohen
Jonathan M. Cohen
Counsel of Record
Mark A. Packman
Kami E. Quinn
Jenna A. Hudson
Michelle A. Price
Kristiné M. Hansen
GILBERT LLP
1100 New York Avenue, N.W.
Suite 700
Washington, D.C. 20005
(202) 772-2259
cohenj@gotofirm.com

CERTIFICATE OF SERVICE

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

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

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

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

Dated: March 19, 2014

/s/ Jonathan M. Cohen
Jonathan M. Cohen