Appeal No. 13-17247

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

—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
CIVIL ACTION NO. 2:13-CV-01079-PHX-DGC
THE HONORABLE DAVID G. CAMPBELL, JUDGE

BRIEF OF CONSTITUTIONAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

The Arizona Legislature has enacted a law that purports to condemn race and sex discrimination by prohibiting abortions obtained "because of" the race or sex of the fetus ("the Ban"). Absent any evidence that women in Arizona have abortions because of the race of the child that will be born, the Ban's sponsors argued that the higher than average rate of abortions obtained by African-American women indicates that these women are "de-selecting" their race, having abortions out of some kind of racial self-hatred, a desire not to produce a child who is, like they are, African-American. Appellants' Br. at 8-10. Similarly lacking any evidence that women in Arizona have abortions to "de-select" their sex, the sponsors of the Ban point to a preference for sons and evidence of sex-selective abortions taking place in China and India under vastly different social conditions. The sponsors argued that Asian and Pacific Islander ("API") women who come to the United States obtain sex-selective abortions here, even though evidence does not bear this out. Id. at 10-12.[1]

The plaintiffs challenged the Ban, alleging that 1) the rationale supporting the Ban was infused with racial stereotypes, 2) the Ban's purpose was to promote

[1] In fact, the evidence establishes that API women having abortions in the United States and African-American women have abortions for the same reasons that all other women do. *See* Lawrence B. Finer, et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 110 (Sept. 2005).

these stereotypes, and 3) the Ban denies the plaintiffs equal treatment because it subjects the plaintiffs' decisions to obtain abortions—the reason for which must be reported under Arizona's previously enacted reporting requirements—to *increased scrutiny based on their race*. That the plaintiffs allege the Ban denies plaintiffs equal treatment—by subjecting them to increased scrutiny based on their race during the process by which information is obtained from them about the reasons they are obtaining an abortion—is sufficient to confer standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), and *Allen v. Wright*, 468 U.S. 737 (1984).

INTEREST OF AMICI CURIAE[2]

Amici are scholars[3] who teach, research, and write about constitutional law, with particular interests in constitutional equality standards, privacy law, first amendment issues, and reproductive rights. Amicus Caitlin Borgmann is a Professor of Law at CUNY School of Law. She teaches, researches, and writes in the area of constitutional law, including on the role and judicial treatment of factfinding in constitutional rights cases, and on standing. She was a Visiting

[2] This brief is filed with the consent of the parties as required under F.R.A.P. 29. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amici curiae or their counsel contributed money intended to fund preparing or submitting the brief.

[3] The Scholars participate in this case in their personal capacity; titles are used only for purposes of identification.

Scholar at Columbia Law School from 2012-2013 and has published in the Harvard Law Review Forum; California Law Review; Southern California Law Review; Stanford Law & Policy Review; and Columbia Journal of Gender & Law, among others. Amicus Priscilla Smith is an Associate Research Scholar in Law and Director of the Program for the Study of Reproductive Rights in the Information Society Project at Yale Law School. She teaches, researches, and writes on constitutional law, focusing on the First, Fourth, and Fourteenth Amendments, religious freedom, reproductive rights, and privacy law. She has published in the Yale Law Review Online, the Harvard Journal of Gender & Law, and the Brooklyn Journal of Law and Policy, among others.

RELEVANT STATUTORY FRAMEWORK

1. The Challenged Statute

The challenged statute, Arizona Revised Statute § 13-3603.02 (hereinafter "the Ban"), prohibits any person from "[p]erform[ing] an abortion knowing that the abortion is sought based on the sex or race of the child or the race of a parent of that child."[4] Before performing an abortion, the abortion provider must complete an affidavit affirming that he or she "is not aborting the child because of the child's sex or race and has no knowledge that the child to be aborted is being aborted because of the child's sex or race." Ariz. Rev. Stat. § 36-2157 (1).

[4] The statute is reproduced in full in the Plaintiffs-Appellants' Brief.

Violation of the Ban is a Class 3 felony. *Id.* § 13-3603.02(A). The Ban also creates a civil liability provision. It allows a woman's husband, if he impregnated her, or the woman's parents if she is under 18 years of age, but not the pregnant woman herself, to bring a civil action against the provider seeking monetary damages for "all injuries" resulting from a violation of the Ban, including psychological injuries from "loss of companionship and support." *Id.* § 13-3603.02(C).

2. Pre-existing Unchallenged Reporting Requirement

A pre-existing Arizona statute requires abortion providers to report information about each abortion they perform, including 1) the race and ethnicity of the patient, 2) the patient's number of prior pregnancies and prior abortions, and 3) her reason for the abortion, including whether "elective or due to maternal or fetal health considerations." Ariz. Rev. Stat. § 36-2161 (7), (9) & (12). An online system was developed to collect this information, and these requirements remain in effect. *See* Bureau of Health Status and Vital Statistics, Abortion Reporting, *http://www.azdhs.gov/plan/crr/ar/*.

SUMMARY OF ARGUMENT

First, the purpose of standing doctrine, which is designed to preserve the separation of powers, is met in this case. Plaintiffs allege 1) the Ban denies them equal treatment, a concrete particularized injury in fact, that is 2) caused by the

Ban's promotion of racial stereotypes, and 3) redressable by the requested relief. *See Lujan*, 504 U.S. at 560-61. In granting the defendants' motion to dismiss, the trial court misinterpreted *Allen v. Wright's* requirement that plaintiffs "allege a stigmatic injury suffered *as a direct result of having been denied equal treatment*," *see NAACP v. Horne*, No. 2:13-cv-01079-PHX-DGC, Order at 7 (D. Ariz. Oct. 3, 2013) (hereafter "Order") (citing *Allen*, 468 U.S. at 755) (emphasis added by the court), to require that to have standing the plaintiffs must allege denial of a *benefit*, in this case denial of an abortion. *Id.* However, as amici demonstrate below, the allegation that plaintiffs are "denied equal treatment" because the Ban *subjects their reasons for obtaining abortions to increased scrutiny based on their race* is sufficient to confer standing under *Allen* and *Lujan*.

Second, a primary purpose of the Equal Protection Clause is to protect against stigmatic injury caused by the denial of equal treatment. Such stigmatic harm is cognizable absent denial of a material benefit. The court below erred in disregarding Equal Protection Clause and Establishment Clause cases recognizing standing where plaintiffs allege stigmatic injury caused by governmental action. *See NAACP v. Horne*, Order at 9-10.

The plaintiffs therefore meet the requirements for standing under *Lujan v. Defenders of Wildlife* and *Allen v. Wright*, as interpreted by this Court. They deserve their day in court to prove their allegations that this law was enacted to,

and will, 1) promote racist stereotypes about the reasons API and African-American women obtain abortions and 2) to subject them and their decision-making processes to additional scrutiny when they seek abortions in Arizona, causing them injury in fact.

ARGUMENT

I. The Purpose of Article III Standing Requirements Is Met in this Case.

As the Supreme Court has explained in *Lujan v. Defenders of Wildlife*, "standing is an essential and unchanging part of the case-or-controversy requirement of Article III." 504 U.S. at 560. It is designed to limit judicial review to proper "cases" and "controversies," and to maintain the separation of powers. *Id.* (citing *Allen v. Wright*, 468 U.S. at 751). It "is perhaps the most important" of the case-or-controversy doctrines limiting federal judicial power. *Allen v. Wright*, 468 U.S. at 750-51. As the court noted in *Allen*, at the heart of the standing doctrine is the requirement that the plaintiff "allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* at 751. While standing doctrine has evolved considerably over the last century[5] and has been the subject of much academic and judicial debate,[6] this case

[5] *See generally* Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992) (describing evolution of standing).

[6] *See, e.g.*, John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (1997), Samuel Issacharoff & Pamela S. Karlan, *Standing and*

does not involve difficult aspects of standing doctrine. Rather, this is a straightforward case governed by clear precedent, *Allen v. Wright*, 468 U.S. 737 (1984), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

In *Allen*, the Court held that a stigmatic injury that would be suffered by all members of a racial group when the government discriminates on the basis of race "accords a basis for standing only to 'those persons who are personally denied equal treatment'" by the challenged state action. 468 U.S. at 755. In *Lujan*, the Court held that the "irreducible constitutional minimum of standing" is comprised of three elements:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) "actual or imminent, not conjectural' or 'hypothetical,'" . . . Second, there must be a causal connection . . . the injury has to be "fairly . . . trace[able] to the challenged action . . . . Third, it must be "likely," . . . that the injury will be "redressed by a favorable decision."

504 U.S. at 560-61. Plaintiffs meet these tests.

A. Under *Lujan* and *Allen*, Stigmatic Injury Is Sufficient for Standing Provided Plaintiffs Also Allege Personal Denial of Equal Treatment.

Lujan and *Allen* are both concerned with ensuring that courts not adjudicate cases with generalized claims of injury. In *Allen v. Wright*, the plaintiffs were the parents of black public school children who challenged the IRS's failure to adopt

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Misunderstanding in Voting Rights Law, 111HARV. L. REV. 2276 (1998) (responding to Ely).

standards that would fulfill its obligation to deny tax-exempt status to racially discriminatory private schools. The plaintiff class was vast, a nationwide class of "several million persons" comprising plaintiffs and their children, and "all other parents of black children attending public school systems undergoing, or which may in the future undergo, desegregation pursuant to court order [or] HEW regulations and guidelines." *Id.* at 743 (citations omitted).

The Court first held that, if plaintiffs were alleging a claim of stigmatic injury or denigration that is suffered by all members of a racial group when the government discriminates on the basis of race, this claim of injury did not confer standing. *Id.* at 753-54. Stigmatic injury "accords a basis for standing only to 'those persons who are personally denied equal treatment'" by the challenged state action. *Id.* at 755. Because the plaintiffs did "not allege a stigmatic injury suffered as a direct result of having personally been denied equal treatment," they did not have standing. *Id.* (discussing other cases in which plaintiffs challenged policies without alleging "that they had been or would likely be subject to the challenged practices"). Thus, the Court in *Allen* rejected "the *abstract* stigmatic injury," refusing to extend standing "nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating." *Id.* at 755-56 (emphasis added). The Court wrote that "[r]ecognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for

the vindication of the valid interests of concerned bystanders.' . . . Constitutional limits on the role of the federal courts preclude such a transformation." *Id.* at 756 ("expressing concern that "[a] black person in Hawaii could challenge the grant of a tax exemption to a racially discriminatory school in Maine").[7]

Eight years later in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), the Court rejected a suit brought by environmental groups challenging a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered Species Act of 1973 in such fashion as to render it applicable only to actions within the United States or on the high seas. *Id.* at 557-58. The Court held that the plaintiffs had not established a sufficient "injury in fact." The " 'injury in fact' test requires more than an injury to a cognizable interest," the Court wrote. "[I]t requires that the party seeking review be himself among the injured." *Id.* at 563. The plaintiffs were unable to establish standing where they personally suffered no "imminent" injury. The Court also rejected the plaintiffs' three "novel standing theories," which would grant standing to anyone who 1) uses any part of a "contiguous ecosystem adversely affected by a funded activity," 2) "has an interest in studying or seeing the endangered animals anywhere on the globe," and 3) has a

[7] The Court also held that the plaintiffs' second claim of injury, the children's diminished ability to receive an education in a racially integrated school, was insufficient to support standing. *Id*. at 757-59. While noting that the claim was judicially cognizable, and, in fact "one of the most serious injuries recognized in our legal system," the Court held the injury was not "fairly traceable to the Government conduct respondents challenge as unlawful." *Id.* at 757.

"professional interest in such animals, even if not affected by the unlawful action in question." *Id.* at 566. Demonstrating the same prudential concerns animating the Court in *Allen v. Wright*, the Court noted that the plaintiffs' theories in *Lujan* would grant standing to anyone who goes to see Asian elephants in the Bronx Zoo; any visitor could sue the federal government for failure to comply with procedural requirements concerning a federally funded project in Sri Lanka. The Court noted that a person who "observes or works with animals of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that might have been the subject of his interest will no longer exist." *Id.* But conferring standing on anyone in the world, even those with no direct connection to the animals or the project at issue, simply because they opposed the project was too much. It goes, "beyond the limit, . . . and into pure speculation and fantasy, to say that 'such a person' is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection." *Id.* at 567.

B. Because Plaintiffs Alleged They Are Personally Denied Equal Treatment by the Ban, They Have Standing Under *Lujan* and *Allen*.

In contrast to the plaintiffs in both *Allen* and *Lujan*, in this case the plaintiffs do not allege an abstract ideological injury stemming from mere disagreement with the Ban. They allege concrete injury-in-fact caused by the Ban's promotion of racial stereotypes, because they are personally subject to discriminatory treatment

when they seek abortions and are questioned about their race, their history of prior abortions, and their reason for obtaining abortions, knowing that the state views their motives with suspicion. They allege that:

1. The members of both the MC-NAACP and NAPAWF include women who have sought and women who will seek abortion care, as well as women who have considered or would consider doing so if faced with an unintended or medically complicated pregnancy. *NAACP v. Horne*, No. 2:13-cv-01079-PHX-DGC, Complaint at ¶¶ 1, 4 (filed May 29, 2013).

2. The Act is motivated by, based on, and perpetuates racially discriminatory stereotypes about African-American women, Asian culture, API women, and abortion care, and thereby demeans, stigmatizes, and discriminates against members of both Plaintiff groups. " *Id.* at ¶¶ 3, 6.

3. The Act requires abortion providers to complete an affidavit stating that (1) that the person making the affidavit is not providing the abortion care because of the "child's" sex or race and (2) has no knowledge that the woman has decided to seek abortion care because of the "child's" sex or race. *Id.* at ¶ 24.

4. The Act is motivated by racist and discriminatory beliefs about the reasons African-American and API women decide to obtain abortion care, and thus intentionally stigmatizes certain women seeking abortion care on the basis of race. *Id.* at ¶¶ 52, 53, 54.

5. The Act intentionally denies African-American and API women equal treatment under the law because its purpose is – by virtue of their race – to scrutinize their personal, private, and constitutionally protected decisions to have an abortion. *Id.* at ¶ 54.

These are not generalized claims of abstract stigma, brought by a broad and distant class of "bystanders" offended by the Ban. Rather, plaintiffs allege that they will personally be denied equal treatment because of the Ban. The Arizona Legislature classified women into African-American women, API women,

and other women. It made assumptions about African-American women and API women and the reasons these women purportedly seek abortions, and it enacted a law specifically to address the abortion decisionmaking of these women. *See* Compl. ¶ 59 ("the Act stigmatizes [Plaintiffs' members'] decision – and no other women's decision – to seek abortion care"; *id.* ¶ 62 (the Act's "purpose is to scrutinize African-American and API women" when they seek abortions). The Ban promotes these stereotypes about plaintiffs. Official racial stereotyping of this type "threaten[s] to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility. " *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Arizona's law thus directly affects plaintiffs' "interest in [their] own self-respect, dignity and individuality." *Smith v. City of Cleveland Heights*, 760 F.2d 720, 722 (6th Cir. 1985).

Women who are members of the plaintiff groups who seek abortions must now do so under a process that is tainted by legislative assumptions about why they are seeking abortions. It is irrelevant that they can still obtain an abortion. *See Powers v. Ohio*, 499 U.S. 400, 411 (1991) (criminal defendant has standing to challenge selection of jurors as racially discriminatory regardless of whether the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant). Even if these women do not choose to forego an abortion altogether, they must expose themselves to a process that is infused with racist assumptions

about their reasons for the abortion. *See id.* (racial discrimination in the selection of jurors "'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt"). As the complaint alleges, MC-NAACP and NAPAWF's members include women who will seek abortion care or would consider doing so if faced with an unintended pregnancy or medically complicated pregnancy. Compl. ¶¶ 1, 4. The Act violates their rights "by treating their personal, private, and constitutionally protected decision to end a pregnancy as automatically suspect solely because of their race." Compl. ¶ 63.

Although the Legislature claimed that it was not asking physicians to "investigate" women's reasons for an abortion, it nevertheless made clear that the affidavit requirement was intended for doctors "'to make sure [the abortion is] not based on sex selection or race selection.'" Appellants' Br. at 38; *see also id.* (required affidavit ensures "'that the doctor can express how he knowingly is making sure, or in his heart he is not knowingly performing an abortion due to sex selection or race selection.'"). Moreover, Arizona's separate abortion reporting law requires abortion providers to document information including "[t]he woman's race and ethnicity,"[8] "[t]he number of prior pregnancies and prior abortions of the

[8] In Arizona, "women obtaining abortions [a]re asked . . . about their race," and their answer choices include Black or African American, Asian, and Native Hawaiian/Pacific Islander. See 2012 Abortion Report at 7 (available at: http://www.azdhs.gov/plan/crr/ar/); reporting form (available at: vhttp://www.azdhs.gov/plan/crr/ar/).

woman," and "[t]he reason for the abortion, including whether the abortion is elective or due to maternal or fetal health considerations." Ariz. Rev. Stat. § 36-2161. Given the Legislature's express focus on the women in the plaintiff groups as its driving motivation in passing the Ban, it follows that plaintiffs will feel scrutinized, stigmatized, and like "second-class citizens" whenever they seek abortion services and must undergo this questioning, knowing what the state has assumed about their abortion decisionmaking.

II. A Primary Purpose of the Equal Protection Clause Is to Protect Against Stigmatic Injury Caused by the Personal Denial of Equal Treatment, and Plaintiffs Have Standing in the Absence of Denial of a Material Benefit.

As the United States Supreme Court has repeatedly recognized, one of the central purposes of the Equal Protection Clause is to ensure that people are not made to feel like second-class citizens due to government action based on racially discriminatory grounds. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (recognizing intangible, psychological harms of segregation, even where "physical facilities and other 'tangible' factors may be equal").[9] Far from denying that

[9] *See also Powers v. Ohio*, 499 U.S. at 415 (referring to "the Fourteenth Amendment's mandate that race discrimination be eliminated from all official acts and proceedings of the State"). *Cf. also Smith-Kline Beecham v. Abbott Laboratories, Inc.*, 740 F.3d 471, 482 (9th Cir. 2013) ("*[United States v.] Windsor* was . . . concerned with the public message sent by DOMA about the status occupied by gays and lesbians in our society. This government-sponsored message

stigmatic injury is cognizable under the Equal Protection Clause, the Court in *Allen* reaffirmed its importance, but required that the plaintiffs have a direct connection to the discrimination. *Allen*, 468 U.S. at 754 (acknowledging "the stigmatizing injury often caused by racial discrimination" and noting that [t]here can be no doubt that this sort of noneconomic injury is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing").

Indeed, stigmatic injury suffered as a result of a denial of equal treatment is cognizable even in the absence of evidence that the plaintiff suffered additional, concrete harm. The Supreme Court and lower courts have repeatedly recognized stigmatic harm as sufficient for standing under the Equal Protection Clause, including where a plaintiff felt that a process was unfair or demeaning because it had been infected with racial bias. In *Powers v. Ohio*, for example, the Supreme Court recognized that racial discrimination in the selection of jurors "'cast[] doubt on the integrity of the judicial process,' and place[d] the fairness of a criminal proceeding in doubt," and held that this injury was sufficient for standing regardless of whether the individual jurors dismissed by the prosecution may have been predisposed to favor the defendant. 499 U.S. 400, 411 (citing Rose v.

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was in itself a harm of great constitutional significance . . . ." (citing *United States v. Windsor*, —— U.S. ——, 133 S. Ct. 2675, 186 L.Ed.2d 808 (2013)).

Mitchell, 443 U.S. 545, 556 (1979)).[10] Where the plaintiffs have alleged personal denial of equal treatment—as they have in this case—laws that are adopted based on offensive racial stereotypes and assumptions of racial inferiority impose an injury on the targeted group sufficiently concrete for standing under the Equal Protection Clause, even if they do not impose any other measurable disadvantage.[11]

A similar standing rule applies where a plaintiff challenges government action that sends a message of "outsider status" or imposes "spiritual harm" under the Establishment Clause. *See Catholic League for Religious & Civil Rights v. City & Cnty.of San Francisco*, 624 F.3d 1043, 1052-53 (9th Cir. 2010) (en banc). Moreover, when such injury is alleged, standing does not require that plaintiffs alter their behavior to avoid contact with the offending governmental act or symbol; being subjected to the offensive symbol is enough. In *Vasquez v. Los Angeles County*, 487 F.3d 1246 (9th Cir. 2007), for example, the plaintiff "alleged

[10] *See also, e.g., N.E. Fla. Contractors v. Jacksonville*, 508 U.S. 656, 666 (1993) (discriminatory bidding process is inherently injurious and sufficient for standing, regardless of whether the barrier actually impeded the plaintiff); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 280–281, n.14 (1978)(principal opinion) (twice-rejected white male university applicant had standing even if he had been unable to prove that he would have been admitted in the absence of the challenged affirmative action program); *Smith v. City of Cleveland Heights*, 760 F.2d 720, 722 (6th Cir. 1985) (plaintiff had standing where he was "forced to interact on a daily basis within [his] community under the weight of th[e] imposed badge of inferiority" resulting from a racially discriminatory steering policy for housing, even where he had not personally been steered).

[11] *See, e.g., Shaw*, 509 U.S. at 650 (reapportionment legislation causes cognizable harms even in the absence of vote dilution, because "[i]t reinforces racial stereotypes").

that Defendants' act in 'singling out the cross for removal from the LA County Seal' conveyed a state-sponsored message of hostility towards Christians and sent a clear message to Christians that they were outsiders, not full members of the political community." *Id.* at 1248-49. Noting that "a standing rule requiring plaintiffs to show affirmative avoidance would impose too onerous a burden upon those seeking to challenge governmental action under the Establishment Clause," *id.* at 1252, this Court held that "spiritual harm resulting from unwelcome direct contact with an allegedly offensive religious (or anti-religious) symbol is a legally cognizable injury and suffices to confer Article III standing." *Id.* at 1253. Similarly, in *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir. 1997), the Fourth Circuit held that a plaintiff had standing to challenge removal of a Ten Commandments display from a county courtroom based on allegations that the religious display caused him psychological and emotional distress, even in the absence of a claim that the display caused him to alter his behavior or suffer material loss. *Id.* at 1087-89; *see also Vasquez*, 487 F.3d at 1252 (citing and adopting reasoning of *Suhre*).

Here, the district court erred by refusing to give weight to any Establishment Clause standing cases, claiming that the expressive nature of "religious injuries" is "unique" to Establishment Clause jurisprudence. Order at 9-11; *see also id.* at 12 ("this is not an Establishment Clause case"). Protection against expressive

injuries—including stigma, second-class citizenship, and outsider status—however, lies at the core of the Equal Protection Clause no less than under the Establishment Clause.[12] In fact, the Court's development of modern equal protection doctrine as embodying a protection against government-imposed stigma and outsider status precedes the Court's recognition of this same principle in the Establishment Clause cases.[13]

As these cases demonstrate, therefore, contrary to decision below,[14] it is not necessary that plaintiffs either give up their right to obtain an abortion or be denied

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[12] *See* Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1533-35, 1545-47 (2000) (noting that both Equal Protection and Establishment Clauses embody principle that "expressive harms in themselves are constitutional injuries" independently of any other concrete harms); Alan A. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 150 (1990) (pointing out that both Establishment Clause violations and racial segregation send a message offensive to the targeted groups and are "constitutionally invalid because of their symbolic content alone"); *see also* Caroline Mala Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347, 380-83 (2012) (expressivism reflects principle "that the state cannot, consistent with the Equal Protection Clause or the equal protection component of the Establishment Clause, convey the message that some people are less equal than others or less worthy of regard because of their race, sex, or religious beliefs").

[13] *See* Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 2003 SUP. CT. REV. 357, 368 (noting that "concern for dignitary harms," found in the interpretation of the Establishment Clause successfully championed by Justice O'Connor, has roots in "modern equal protection doctrine as applied to discrimination against 'outsiders' in other categories of self-identity, such as race").

[14] *See NAACP v. Horne*, Order at 7 ("Plaintiffs must also show that their members personally have been denied equal treatment by the Act. As noted above, Plaintiffs

one in order to demonstrate standing. Like the hypothetical plaintiffs mentioned in *Suhre*, plaintiffs here "do[] not have any realistic option of avoiding contact" with the offensive government conduct, the Ban and the increased scrutiny it imposes on them based on their race. *See Suhre*, 131 F.3d at 1088-89; *see also Vasquez*, 487 F.3d at 1252. In such a circumstance, requiring a person to forego important activities, in this case obtaining a constitutionally protected abortion, "in order to gain standing seems a more onerous burden than Article III requires." *Suhre*, 131 F.3d at 1088-89; *see also Vasquez*, 487 F.3d at 1252 (following *Suhre*).

Thus, it simply cannot be – as the district court suggested – that the plaintiffs lack standing to challenge this law because they have not been denied an abortion. The reason plaintiffs have not been denied abortions is because the government's offensive stereotypes are false. This fact provides plaintiffs little comfort, however, when they seek an abortion and must record their race, number of prior abortions, and reasons for the abortion, knowing that the state is convinced they intend to "deselect" their own race or not bear a daughter. Under the district court's logic, Jewish Kosher bakers obviously targeted by a law forbidding the use of human blood in baked goods, based on a notorious anti-Semitic "blood libel,"[15] could not

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make no such claim. They do not assert that their members have been or will be denied abortions or other medical care . . . .").

[15] *See, e.g., Lebanese Daily Renews Age-Old Jewish Blood Libel*, Israel National News (Apr. 2, 2013) ("The Lebanese daily *Al-Sharq* published an article last week

challenge the law because they do not in fact make their matzah with human blood. Like the offensive governmental messages challenged in Establishment Clause cases, laws like the Ban that invidiously discriminate based on race are classic examples of government action that can produce a direct, stigmatic injury even when it causes no additional, concrete harm. *See* Anderson & Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. at 1533-35, 1545-47. Standing doctrine recognizes and accommodates this reality.

Nor is the state's argument that the law is meant to protect plaintiffs sufficient to deny them standing.[16] A law that employs offensive racial stereotypes under the pretense of protecting the very groups it denigrates imposes the same stigma and outsider status as any other racially discriminatory law. To deny plaintiffs standing on these grounds would mean, for example, that an African American plaintiff could not challenge an affirmative action law that granted black applicants preference in college admissions, enacted because the legislature believed that

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that claimed that Jews eat matzah made with the blood of non-Jews during the holiday of Passover, renewing the age-old blood libel that has fueled vicious anti-Semitic attacks throughout the centuries."), available at: http://www.israelnationalnews.com/News/News.aspx/166687#.UyelmP34iPg.

[16] Jessica Mason Pieklo, *Advocates Ask Ninth Circuit to Reinstate Challenge to Arizona Race- and Sex-Selection Abortion Ban*, RH Reality Check (Mar. 13, 2014), (reporting that "Arizona Attorney General Tom Horne argued to the district court that the law actually protects civil rights because it is designed to protect minorities and 'disfavored genders.'"), available at: http://rhrealitycheck.org/article/2014/03/13/advocates-ask-ninth-circuit-reinstate-challenge-arizona-race-sex-selection-abortion-ban/.]

"black people are stupid." The plaintiff would not suffer a concrete deprivation because of the law, and indeed might stand to "benefit" from it, but she would have to confront its offensive "badge of inferiority" every time she applied for admission to a public college.

Today, it is rare to see blatant governmentally sponsored race discrimination. It is for this reason that the courts apply strict scrutiny to all race classifications, in order to ensure that such classifications are not "in fact motivated by illegitimate notions of racial inferiority." *Johnson v. California*, 543 U.S. 499, 505 (2005). Here, although the Act appears neutral on its face, the legislature did not even attempt to conceal its "illegitimate notions" of racial stereotypes and inferiority. The record is replete with references to unfounded assumptions about African-American and API women and why they seek abortions, including that the former seek to "deselect" their race and the latter to deselect girls. *See* Appellants Br. at 6-10. The Legislature's race-based, derogatory assumptions about these women, which they must confront each time they seek an abortion and are asked to disclose their race and reasons for the abortion, are more than sufficient to grant them standing.

CONCLUSION

For the foregoing reasons, the district court's order granting the motion to dismiss should be reversed.

Respectfully submitted,

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March 19, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief contains 5,471 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), and has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

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

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

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

DATED: March 19, 2014

/s/ Priscilla Joyce Smith
PRISCILLA JOYCE SMITH