

Silently Under Attack: AAPI Women and Sex-Selective Abortion Bans

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The last five years have seen an unprecedented number of abortion restrictions proposed and passed in Congress and in state legislatures around the country. While these attacks on a woman’s ability and right to have an abortion have been well-documented in the media and in the reproductive justice movement, little attention has been paid to the fact that the second-most proposed abortion ban in the country is one that specifically targets Asian American and Pacific Islander (AAPI) women. These so-called “sex-selective abortion bans” exploit a real crisis abroad around son preference to further a domestic political agenda. The language of these bans is written to appear supportive of gender equity, criminalizing the provision of abortion when it is sought based on a preference for the sex of a child. Often accompanied by anti-Asian and anti-immigrant rhetoric, these laws perpetuate a dangerous stereotype about AAPI women in order to harm all women. By attempting to differentiate between “good” and “bad” reasons to have an abortion, sex-selective abortion bans are a slippery slope to even more laws that restrict abortions based on a woman’s reasons for seeking care. Moreover, by forcing health care providers to essentially police and racially profile their own patients, these laws interfere with the trust that is critical for an open and honest doctor-patient relationship.

In this Article, we identify and debunk the myths used to justify these deceptive laws and look at the legislative trend of sex-selective abortion bans in the states and in Congress. We conclude with a discussion of constitutional challenges to sex-selective abortion bans in states where they have been enacted and examine the impact these laws will have on reproductive rights and access.

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INTRODUCTION

Since 2009, over sixty bills have been introduced at the federal and state levels that would criminalize doctors for terminating a pregnancy on the basis of sex preference.¹ These proposed bans are wolves in sheep's clothing. Although they purport to further gender equality, they entrench inequality more deeply by eroding a woman's basic and legal right to make decisions about her own reproductive health.

In 2013, these state bills were the second-most proposed abortion bans in the country.² Eight have been passed into law thus far.³ Under these "sex-selective abortion bans," doctors who perform abortions based on a sex preference could face jail time, fines, or lawsuits from a patient or her family. Some versions of the law even call for the criminalization of anyone who merely assists a woman seeking an abortion on the basis of sex preference, potentially criminalizing receptionists for scheduling the appointment or nurses for taking a woman's blood pressure before her procedure.⁴ In many states, doctors and nurses who merely suspect a patient is seeking a sex-selective abortion are required to report to authorities.⁵ Proponents of these bans, who all have solid anti-abortion voting records, claim their underlying goal is to promote gender equality. Nothing could be further from the truth. These laws are an integral piece of a broader strategy to chip away at abortion rights. As part of an unprecedented wave of attacks on reproductive rights beginning in 2010, these bans were crafted to make their opponents appear to support son

1. *Issue Brief: Race and Sex Selective Abortion Bans*, NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM (NAPAWF), http://napawf.org/wp-content/uploads/2013/11/PRENDAIssueBrief_11.26-FINAL.pdf (last updated July 2013).

2. Jaeah Lee & Molly Redden, *Meet 330 Lawmakers Who Made 2013 "A Terrible Year for Women's Health,"* MOTHER JONES (Jan. 27, 2014), <http://www.motherjones.com/politics/2014/01/state-legislators-sponsored-abortion-restriction-2014>.

3. ARIZ. REV. STAT. ANN. § 13-3603.02 (2013); 720 ILL. COMP. STAT. 510/6(8) (2013), *enjoined by* Consent Decree, *Herbst v. O'Malley* (No. 84-C-5602, D. Ill., Mar. 30, 1993), *available at* <http://www.nrlc.org/uploads/obamabaipa/FedCourtDecree1993BlockingIllinoisLaw.pdf>; KAN. STAT. ANN. § 65-6726 (2013); N.C. GEN. STAT. § 90-21.121 (2013); N.D. CENT. CODE § 14-02.1-04.1 (2013); OKLA. STAT. tit. 63, § 1-731.2 (2013); 18 PA. CONS. STAT. § 3204 (2013); S.D. CODIFIED LAWS § 34-23A-64 (2014).

4. *See, e.g.*, H.B. 845, Reg. Sess. 2013 (Fla. 2013) (prohibiting "actively participating" in a sex-selective abortion).

5. *See, e.g.*, N.C. GEN. STAT. § 90-21.121(a) (2013) (criminalizing performance of an abortion where the provider has knowledge or an objective reason to know that a woman's reasons for an abortion are related to the gender of her child); OKLA. STAT. tit. 63, § 1-731.2 (2013) (requiring knowledge or recklessness); 18 PA. CONS. STAT. § 3204 (2013) (requiring intent, knowledge, or recklessness); S.D. CODIFIED LAWS § 34-23A-64 (2014) (requiring knowledge or reckless disregard).

preference and sex-selective abortion, thereby silencing opposition from feminist, pro-choice and reproductive justice groups.

In an attempt to further legitimize the need for these bans, supporters and members of the anti-choice movement openly accuse Asian American and Pacific Islanders (AAPIs) of being the source of the supposed problem.⁶ Expressing concern over the devastating sex ratio imbalances in China and India, proponents claim that the bans are needed in the United States because Asians are immigrating to this country will spread the practice of sex selection domestically.⁷ This narrative incites xenophobia and harms the AAPI community by perpetuating stereotypes that AAPIs have already faced for generations. It also turns AAPI women into suspects in their doctor's offices, placing them at risk for delay or even denial of critical health services.

This Article examines the rising trend of sex-selective abortion bans, their impact on AAPIs, and constitutional challenges to laws implementing these bans in the courts. Part I provides an overview of the legislative status of the proposed bans. Part II looks at the harm these bans cause to the AAPI community and debunks the myths offered in support of their passage. Part III looks at the legal challenges to these laws, particularly *NAACP v. Horne*, a pending lawsuit against the state of Arizona filed by the American Civil Liberties Union (ACLU) on behalf of the National Asian Pacific American Women's Forum (NAPAWF) and the National Association for the Advancement of Colored People (NAACP).

I. LEGISLATIVE LANDSCAPE

In recent years, sex-selective abortion ban proposals have been on the rise, with more than sixty such bans introduced at the state and federal levels since 2009.⁸ In 2013, it was the second most-proposed type of abortion restriction at the state level. To date, sex-selective abortion bans have passed in eight states—Illinois, Pennsylvania, Oklahoma, Kansas, Arizona, North Dakota, South Dakota, and North Carolina.⁹ Before 2010,

6. See, e.g., Prenatal Nondiscrimination Act (PRENDA) of 2013, H.R. 447 113th Cong. §§ 2(a)(1)(F), (J) (2013), available at <https://www.congress.gov/bill/113th-congress/house-bill/447/text?q=%7B%22search%22%3A%5B%22hr447%22%5D%7D> (“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. . . . [for example,] the Republic of India or the People’s Republic of China, whose recent practices of sex-selection abortion were vehemently and repeatedly condemned by [the U.S. government].”).

7. See *infra* notes 24 and 43 (citing statements made by South Dakota State Representative Don Haggar and Arizona State Senator Rick Murphy).

8. NAPAWF, *supra* note 1.

9. U. CHI. L. SCH. INT’L HUMAN RIGHTS CLINIC, REPLACING MYTHS WITH FACTS: SEX-SELECTIVE ABORTION LAWS IN THE UNITED STATES 29–30 (June 2014), <https://ihrcclinic.uchicago.edu/sites/ihrcclinic.uchicago.edu/files/uploads/Replacing%20Myths%20with%20Facts%20-%20Sex-Selective%20Abortion%20Laws%20in%20the%20United%20States.pdf> [hereinafter *Replacing Myths*]

only Illinois and Pennsylvania had one of these laws on the books and they were enacted in 1975 and 1982, respectively.¹⁰ The ban is not enforced today in Illinois.¹¹

On the federal level, sex-selective abortion bans have been proposed four times in the House of Representatives by Representative Trent Franks (R-AZ) and three times in the Senate by Senator David Vitter (R-LA).¹² In 2012, the proposed legislation received its first and only federal vote under a suspension of the rules in the House, and failed to pass.¹³ The legislation was introduced in both chambers of Congress in 2013, though no significant legislative action was taken. It was reintroduced into the 114th Congress by Senator Vitter in early 2015, and at the time of writing, advocates are awaiting reintroduction in the House. The outcome in the 114th Congress is likely to look very different than in years past. With a new Republican majority in both the House and Senate, advocates expect the measure will pass if brought to a vote and will be sent to the President's desk to either sign or veto.

Most of the states where sex-selective abortion bans have passed are among those with the largest and fastest-growing AAPI populations. Twelve of the fifteen states with the largest AAPI populations¹⁴ and ten of the fifteen states with highest AAPI growth rates¹⁵ have proposed the ban.¹⁶

with Facts].

10. *Id.*

11. In 1993, a federal district court issued a consent decree that enjoined pre-viability enforcement of the Illinois ban. *Herbst v. O'Malley*, 84 C 5602, 1993 WL 59142, at *2 (N.D. Ill. Mar. 2, 1993). The ban is still in place for post-viability sex-selective abortions and ostensibly for non-criminal sanctions for pre-viability sex-selective abortions.

12. Susan B. Anthony Prenatal Nondiscrimination Act of 2008, H.R. 7016, 110th Cong. (2008); Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2009, H.R. 1822, 111th Cong. (2009); Prenatal Nondiscrimination Act (PRENDA) of 2012, H.R. 3541, 112th Cong. (2011); Prenatal Nondiscrimination Act (PRENDA) of 2012, S. 3290 (2012); Prenatal Nondiscrimination Act (PRENDA) of 2013, H.R. 447, 113th Cong. (2013); Prenatal Nondiscrimination Act (PRENDA) of 2013, S. 138, 113th Cong. (2013); Prenatal Nondiscrimination Act of 2015, S. 48, 114th Cong. (2015).

13. NAPAWF, *supra* note 1, at 1–2.

14. California (A.B. 2336, 2013–2014 Reg. Sess. (Ca. 2014)); New York (A07610, 2011–2012 Leg. Sess. (N.Y. 2011); S05033, 2011–2012 Leg. Sess. (N.Y. 2011); A02533, 2013–2014 Leg. Sess. (N.Y. 2013); S02286, 2013–2014 Leg. Sess. (N.Y. 2013)); Texas (H.B. 309, 83d Leg., Reg. Sess. (Tex. 2012)); New Jersey (A3951, 213th Leg., 2008–2009 Leg. Sess. (N.J. 2009); A2157, 215th Leg., 2012–2013 Leg. Sess. (N.J. 2012)); Illinois (Illinois Abortion Law of 1975, 720 ILCS 510/6(8) (Ill. 1975)); Florida (H.B. 1327, 2012 Reg. Sess. (Fla. 2012); S.B. 1702, 2012 Reg. Sess. (Fla. 2012); H.B. 845, 2013 Reg. Sess. (Fla. 2013); S.B. 1072, 2013 Reg. Sess. (Fla. 2013)); Virginia (H.B. 1316, 2013 Reg. Sess. (Va. 2012); H.B. 98, 2014 Reg. Sess. (Va. 2013)); Pennsylvania (Pennsylvania Abortion Control Act, 18 PA. CONS. STAT. § 3204 (1982)); Massachusetts (H.484, 187th Gen. Court, 2011–2012 Leg. Sess. (Mass. 2011); H.1567, 188th Gen. Court, 2013–2014 Leg. Sess. (Mass. 2013)); Georgia (S.B. 529, 2009–2010 Reg. Sess. (Ga. 2010); H.B. 1155, 2009–2010 Reg. Sess. (Ga. 2010)); North Carolina (H716, 2013–2014 Sess. (N.C. 2013)); Michigan (H.B. 5125, 2009–2010 Leg. Sess. (Mich. 2009); S.B. 799 2009–2010 Leg. Sess. (Mich. 2009); H.B. 5731, 2011–2012 Leg. Sess. (Mich. 2012)).

15. See Arizona (H.B. 2784, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.C.R. 2049, 49th Leg., 2d Reg. Sess. (Ariz. 2010); H.B. 2443, 50th Leg., 1st Reg. Sess. (Ariz. 2011)); North Carolina (H716, 2013–2014 Sess. (N.C. 2013)); North Dakota (H.B. 1305 § 14-02.1, 63d Ass., 2013–2014 Sess. (N.D.

Even states that are protective of women's reproductive rights are not wholly immune to this trend. On February 21, 2014, a sex-selective abortion ban was proposed in the California State Assembly. However, during a hearing in the Assembly Committee on Health, it was rejected as harmful to women and discriminatory toward AAPIs.¹⁷ The proposal was so insulting to some lawmakers in California, home to the country's largest AAPI population, that the San Francisco Board of Supervisors and the Oakland City Council passed resolutions condemning the discriminatory laws.¹⁸

II. READING BETWEEN THE LINES

Sex-selective abortion bans are wolves in sheep's clothing and harm, instead of help, AAPI women and girls. Although sex-selective abortion bans purport to further gender equality, they actually entrench inequality deeper by eroding a woman's basic right to make decisions about her own reproductive health. This hypocrisy is made clear by the voting records of the ban's proponents. These same individuals regularly oppose not only abortion, but also policies like pay equity, health care access, funding safety net benefits that support women and children, and sexual and domestic violence prevention laws that would give women more agency and power in their lives. The vast majority of bill sponsors have voted to defund family planning and to impose burdensome restrictions on abortion.¹⁹ Even further illustrative of the fact that sex-selective abortion

2013)); Georgia (S.B. 529, 2009–2010 Reg. Sess. (Ga. 2010); H.B. 1155, 2009–2010 Reg. Sess. (Ga. 2010)); Indiana (H.B. 1430, 2013 Reg. Sess. (Ind. 2013); S.B. 0183, 2013 Reg. Sess. (Ind. 2013)); Texas (H.B. 309, 83d Leg., Reg. Sess. (Tex. 2012)); Florida (H.B. 1327, 2012 Reg. Sess. (Fla. 2012); S.B. 1702, 2012 Reg. Sess. (Fla. 2012); H.B. 845, 2013 Reg. Sess. (Fla. 2013); S.B. 1072, 2013 Reg. Sess. (Fla. 2013)); Virginia (H.B. 1316, 2013 Reg. Sess. (Va. 2012); H.B. 98, 2014 Reg. Sess. (Va. 2013)); South Dakota (H.B. 1162, 2014 Sess. (S.D. 2014)); Idaho (H.B. 693, 2010 Sess. (Idaho 2010)).

16. The states with the fifteen largest AAPI populations are California, New York, Texas, New Jersey, Hawai'i, Illinois, Washington, Florida, Virginia, Pennsylvania, Massachusetts, Maryland, Georgia, Michigan, and North Carolina. The states with the highest growth of AAPIs from 2000 to 2010 are Nevada, Arizona, North Carolina, North Dakota, Georgia, New Hampshire, Delaware, Arkansas, Indiana, Texas, Florida, Virginia, Idaho, South Dakota, and Alabama. *A Community of Contrasts: AAPIs in the United States: 2011*, ASIAN AMERICAN CENTER FOR ADVANCING JUSTICE & ASIAN AMERICAN JUSTICE CENTER, 8, http://www.advancingjustice.org/sites/default/files/Community_of_Contrast.pdf.

17. See *Abortion: Gender Selection: Hearing on A.B. 2336 Before the Assembly Health Comm.*, 2013–2014 Reg. Sess. (Ca. May 6, 2014), http://calchannel.granicus.com/MediaPlayer.php?view_id=7&clip_id=2105 (last visited Feb. 6, 2014).

18. See S.F. Bd. of Supervisors Res. 349-14 (2014), available at <http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/resolutions14/r0349-14.pdf>; Oakland City Council File No. 14-0614 (2015), available at <https://oakland.legistar.com/View.ashx?M=F&ID=3667911&GUID=124DD5DE-7995-41F1-9811-2F8AEBDC3383>.

19. See, e.g., *Replacing Myths with Facts*, *supra* note 9, at 21–23; Oklahoma State Legislature Bill Information for SB 1890 (2009–2010), <http://www.oklegislature.gov/BillInfo.aspx?Bill=SB1890&Session=1000> (last visited Feb. 5, 2015); South Dakota State Legislature House Bill 1162 (2014 Session), http://legis.sd.gov/Legislative_Session/Bills/Bill.aspx?Session=2014&Bill=1162

bans are part of a broader anti-abortion strategy is the ban's inclusion in Americans United for Life's annual "playbook" of model legislation—literally an anti-abortion agenda.²⁰ Ban proponents are co-opting the language of equality to deceive lawmakers into chipping away at reproductive rights.

Worse, these bans perpetuate AAPI stereotypes and continue the legacy of discrimination AAPIs have experienced for many generations in the United States. Early anti-immigrant laws in the United States—the Page Act and the Chinese Exclusion Act—were designed to keep Chinese immigrants out of the country. The Page Act in particular targeted Chinese women who were stereotyped as prostitutes and kept out of the country lest they sully American culture and undermine American values.²¹ Similarly, in the World War II era, the portrayal of Japanese individuals as dangerous foreigners resulted in the internment of 120,000 Japanese Americans.²² In post-9/11 America, stereotypes of South Asians as terrorists have led to rampant racial profiling and unjustified detention of South Asians.²³ Sex-selective abortion bans follow in this ugly tradition, perpetuating harmful stereotypes about AAPI women and the AAPI community more broadly by relying heavily on xenophobic rhetoric that suggests that AAPIs import backwards, gender-biased cultures from Asian countries. For example, during passage of South Dakota's version of the ban, a representative issued the following warning to his fellow lawmakers:

Let me tell you, our population in South Dakota is a lot more diverse than it ever was. . . . There are cultures that look at a sex-selection abortion as being culturally okay. And I will suggest to you that we are embracing individuals from some of those cultures in this country, or in this state. And I think that's a good thing that we invite them to come, but I think it's also important that we send a message that this is a state that values life, regardless of its sex.²⁴

By perpetuating the stereotype that AAPIs do not value the lives of women, ironically, supporters of these bans turn AAPI women into suspects in the

(last visited Feb. 5, 2015).

20. Americans United for Life, *Defending Life 2015* at 21, available at http://aui.org/downloads/defending-life-2015/AUL_Defending_Life_2015.pdf.

21. Page Act of 1875, 18 Stat. 477 (1875).

22. See *Curriculum and Resource Guide: Historical Overview*, JAPANESE AMERICAN CITIZENS LEAGUE 3 (2011), <http://www.jacl.org/wordpress/wp-content/uploads/2015/01/covers.pdf>.

23. See generally Sameera Hafiz & Suman Raghunathan, *Under Suspicion, Under Attack*, SOUTH ASIAN AMERICANS LEADING TOGETHER (2014), available at http://saalt.org/wp-content/uploads/2013/06/SAALT_report_full_links1.pdf (discussing xenophobic political rhetoric and hate violence against South Asian, Muslim, Sikh, Hindu, Middle Eastern, and Arab communities in the United States).

24. See Molly Redden, *GOP Lawmaker: We Need to Ban Sex-Selective Abortions Because of Asian Immigrants*, MOTHER JONES (Feb. 25, 2014) (quoting Representative Don Haggar), <http://www.motherjones.com/politics/2014/02/south-dakota-stace-nelson-ban-sex-based-abortions-because-asian-immigrants>.

doctor's office. Under fear of criminalization, doctors may scrutinize AAPI women's decisions to have abortions in ways they would not scrutinize the decisions of women from other communities. For AAPI women, many of whom face language barriers, a simple misunderstanding could mean being turned away and denied necessary health services.

Despite these consequences, proponents of sex-selective abortion bans would argue such bans are necessary to support women and girls. To be sure, son preference and widespread sex-selective practices have had a devastating effect in some parts of the world, especially in China and India, where cultural practices and social norms dictate a higher worth for sons than daughters. As feminists and human rights activists in these countries know all too well, son preference has contributed to grave sex ratio imbalances abroad, which in turn has resulted in increased trafficking of and violence against women.²⁵ In these countries, economic opportunities for women are much less abundant than they are in the United States. In India, customs such as bridal dowry and patrilineage—the passage of property through sons—are widespread, and parents rely on their sons for care in their old age since there is no public healthcare or pension system.²⁶ In China, the one-child policy forces women, under family and social pressure to give birth to a son, and to abort or discard baby girls.²⁷

However, the socio-cultural landscape in the United States is very different than that in India and China. Research on the frequency of sex selection in the United States has yielded no evidence that sex selection based on son preference is widespread in the AAPI community. In fact, a study using data from the 2000 U.S. Census found that AAPIs proportionally give birth to more girls than white Americans do.²⁸

Thus, contrary to what anti-choice legislators in the United States would like us to believe, banning abortion is not the solution. Common sense alone tells us we cannot help women by hurting them. We cannot in good faith pursue a purportedly beneficial remedy that will, in reality, restrict women's personal decision making and harm their health. To combat gender inequality, we need remedies that reach the root of the problem from which son preference and resulting sex-selection are simply offshoots. This deep-seated social bias can only be solved by working to change the values and circumstances that create a preference for sons. International authorities on the subject, including the United Nations and

25. WORLD HEALTH ORGANIZATION (WHO), PREVENTING GENDER-BIASED SEX SELECTION: AN INTERAGENCY STATEMENT 5 (2011), available at http://whqlibdoc.who.int/publications/2011/9789241501460_eng.pdf?ua=1.

26. United Nations Population Fund (UNFPA), GUIDANCE NOTE ON PRENATAL SEX SELECTION, 4 (2010), http://www.unfpa.org/webdav/site/global/shared/documents/publications/2010/guidenote_prenatal_sexselection.pdf; see also *Replacing Myths with Facts*, *supra* note 9, at 24.

27. See Ma Jian, Op-Ed, *China's Brutal One-Child Policy*, N.Y. TIMES (May 21, 2013), available at http://www.nytimes.com/2013/05/22/opinion/chinas-brutal-one-child-policy.html?_r=0.

28. *Replacing Myths with Facts*, *supra* note 9, at 15–18.

the World Health Organization, have stated that solutions like improving the economic independence and education of women and are the real answers to son preference.²⁹ These solutions are more likely to eradicate the preference for sons than the current wave of sex-selective abortion bans in the United States.

III. LEGAL IMPLICATIONS OF SEX-SELECTIVE ABORTION BANS

Given that sex-selective abortion bans have slipped into state legislatures virtually unnoticed, scant attention has been given to their potential impact on reproductive rights legislation and litigation. Of those that have been signed into law, only the bans in Illinois, North Dakota, and Arizona have been challenged in court.³⁰ The challenge to Arizona's race and sex-selective abortion ban is the only one that remains pending.³¹

In March 2011, the Arizona state legislature passed H.B. 2443, which prohibits any person from knowingly providing an abortion on the basis of race or gender.³² Race-selective abortion bans, sometimes proposed together with sex-selective abortion bans, purport to address the high rate of abortions among black women by using a social responsibility frame to suggest that black women have a racial obligation to have more babies.³³ Under H.B. 2443, a violation of these bans constitutes a Class 3 felony and failure to report a violation may result in civil penalties up to \$10,000.³⁴ In addition to allowing the government to criminally prosecute any provider who allegedly performs a race- or sex-selective abortion, H.B. 2443 created a right of action for the husband or the parents of a woman who seeks to terminate her pregnancy, and made no exception for pregnancies that are the result of rape or incest.³⁵

On May 29, 2013, NAPAWF and NAACP filed suit against Arizona in federal district court arguing that the Act violated the Equal Protection Clause of the Fourteenth Amendment.³⁶ The case, *NAACP v. Horne*, was

29. WHO, *supra* note 24, at 10.

30. See *Herbst v. O'Malley*, 84 C 5602, 1993 WL 59142 (N.D. Ill. Mar. 2, 1993); *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, 855 N.W.2d 31 (N.D. 2013); *NAACP v. Horne*, 2013 U.S. Dist. LEXIS 143306 (D. Ariz. 2013), *appeal docketed*, No. 13-17247 (9th Cir. Nov. 4, 2013).

31. In June 2013, the Center for Reproductive Rights filed suit against the state of North Dakota challenging H.B. 1305, which, among other things, contained a sex-selective abortion ban. The claim regarding the sex-selective abortion ban was later dismissed from the case. See *Complaint, MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, 855 N.W.2d 31 (N.D. 2013) (No. 13-cv-00071, *available at* http://reproductiverights.org/sites/crr.civicactions.net/files/documents/MKB%20Inc_Complaint.pdf).

32. Codified at ARIZ. REV. STAT. ANN. §§ 13-3603.02, 36-2157 (2014).

33. See *e.g.*, SISTER SONG, RACE GENDER AND ABORTION: HOW REPRODUCTIVE JUSTICE ACTIVISTS WON IN GEORGIA 3 (2010), *available at* http://www.trustblackwomen.org/SisterSong_Policy_Report.pdf.

34. ARIZ. REV. STAT. ANN. §§ 13-3603.02(A), (D) (2014).

35. ARIZ. REV. STAT. ANN. §§ 13-3603.02(B), (C) (2014).

36. *Complaint at* 13-14, *NAACP v. Horne*, 2013 U.S. Dist. LEXIS 143306 (D. Ariz. 2013) (No. 13-cv-01079), *available at* <https://www.aclu.org/reproductive-freedom/naACP-et-al-v-tom-horne-et-al>.

dismissed by the court due to issues of standing.³⁷ It is currently pending in the U.S. Court of Appeals for the Ninth Circuit.³⁸ In *Horne*, NAPAWF and the NAACP argued that H.B. 2443 violated the Equal Protection Clause of the Fourteenth Amendment because, in enacting the statute, the State “acted with an intent or purpose to discriminate against [AAPI and black women] based upon membership in a protected class.”³⁹ Under the Supreme Court’s decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, to establish a violation of the Equal Protection Clause, a plaintiff must show that a discriminatory purpose was simply a “motivating factor” in a legislature’s decision—she need not show that the purpose was a “dominant” or “primary” one.⁴⁰ In making its evaluation, a court will consider both circumstantial and direct evidence of legislative intent.⁴¹

One example of this evidence comes from Arizona’s ample legislative history, replete with racist and xenophobic comments. During hearings, supporters of H.B. 2443 relied heavily on reports of the occurrence of such abortions in India and China.⁴² They also expressed concern over present and future immigration trends of AAPI women to Arizona and the importation of their cultural biases to the United States. For example, in explaining his vote, one senator stated:

We know that it’s something that is pervasive in some areas. We know that people from those countries and from those cultures are moving and immigrating in some reasonable numbers to the United States and to Arizona. And so with that in mind, why in good conscience would we want to wait until the problem does develop and bad things are happening and then react when we can be proactive and try to prevent the problem from happening in the first place.⁴³

Courts have held that such unsupported and inflammatory legislative history can constitute evidence of racial discriminatory intent.⁴⁴

complaint [hereinafter *NAACP Complaint*].

37. *NAACP v. Horne*, 2013 U.S. Dist. LEXIS 143306 (D. Ariz. 2013), *appeal docketed*, No. 13-17247 (9th Cir. Nov. 4, 2013).

38. *Id.*

39. Plaintiffs’ Opposition to Defendants’ Motion to Dismiss at 5, *Horne*, 2013 U.S. Dist. LEXIS 143306 (No. 13-cv-01079) (citing *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)).

40. 429 U.S. 252, 265–66 (1977).

41. *Id.*

42. *See, e.g., Hearing on H.B. 2443 Before the House Comm. on Healthcare and Medical Liability Reform*, 50th Sess., 1st Reg. Sess. (Ariz. Mar. 2, 2011) (discussing articles about gender preference in India and China and gender preference reflected in Indian and Chinese American communities in the United States).

43. *See NAACP Complaint, supra* note 36, at 10 (quoting Senator Rick Murphy).

44. *See Smith v. Town of Clarkton*, 682 F.2d 1055, 1066 (4th Cir. 1982) (citing testimony that expressed concerns about “‘new’ people” and “an influx of ‘undesirables’” in the construction of a new housing project as “strong” evidence of racially discriminatory intent); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 648 F. Supp. 2d 805, 811–12 (E.D. La. 2009) (citing testimony that expressed concern over individuals who “would threaten the . . . shared ‘value system’ and . . . ‘way of

Interestingly, despite supporters' frequently expressed fears of imported sex selection, no evidence was ever presented to the legislature showing that AAPI women or women of any other race in Arizona were choosing to have sex-selective abortions.

In response to plaintiffs' arguments, the State countered that the race-neutral language of H.B. 2443 belied any legislative intent to distinguish between any racial groups, or, more specifically, any intent to single out AAPI women.⁴⁵ However, facially neutral language alone cannot save a law from being struck down for its racially discriminatory intent.⁴⁶ Indeed, the Supreme Court has held that even a law that is facially neutral with respect to racial classification warrants "strict scrutiny" analysis under the Equal Protection Clause if it can be proved that the law was motivated by a racial purpose or objective.⁴⁷

Thus, to satisfy strict scrutiny, a law must serve a "compelling" state interest and also be "narrowly tailored" for those purposes.⁴⁸ The State indeed has a compelling interest in eliminating discrimination against women.⁴⁹ However, it is clear that under any level of scrutiny, sex-selective abortion bans cannot be considered narrowly tailored to promote gender equity, or even tailored to fulfill their most ostensible purpose—banning sex-selective abortions. The so-called solution is misguided, unworkable, and does not address the root of gender inequity in a way that is suited for the domestic context. Policies in the United States should reflect the circumstances in the United States, rather than respond to gender imbalances abroad. Son preference is not widespread domestically. As previously mentioned, the state of gender equity in the America is much less stark than in India and China.

life" of the homeowners as evidence of racially discriminatory intent).

45. Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) at 10–11, *NAACP v. Horne*, 2013 U.S. Dist. LEXIS 143306 (D. Ariz. 2013) (No. 13-cv-01079).

46. *See, e.g.*, *Hunter v. Underwood*, 471 U.S. 222 (1985) (invalidating facially neutral provision of Alabama Constitution which disenfranchised persons of all races convicted of crimes of moral turpitude because legislative history demonstrated desire and intent to disenfranchise Blacks, in particular); *see also Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 427 (1948) (Murphy, J. concurring) (stating "[w]e need but unbutton the seemingly innocent words of [the law] to discover beneath them the very negation of all the ideals of the equal protection clause."); *Oyama v. California*, 332 U.S. 633, 650–51 (1948) (Murphy, J. concurring) ("Reference is made to the fact that nowhere in the statute is there a single mention of race, color, creed or place of birth or allegiance as a determinant of who may not own or hold farm land. . . . However, an examination of the circumstances surrounding the original enactment of this law . . . reveals quite a different story."); *cf. Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) ("Can a court be blind to what must be necessarily known to every intelligent person in the State?").

47. *Miller v. Johnson*, 515 U.S. 900, 913 (1995).

48. *Shaw v. Reno*, 509 U.S. 630, 643 (1993).

49. *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987) (recognizing the "State's compelling interest in eliminating discrimination against women"); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (finding that a state law forbidding gender discrimination in public accommodations did not unconstitutionally burden the First Amendment right of expressive association).

Furthermore, the Arizona ban is unduly restrictive and burdensome on women. As stated by the World Health Organization,

States have an obligation to ensure that these injustices are addressed without exposing women to the risk of death or serious injury by denying them access to needed services such as safe abortion to the full extent of the law. Such an outcome would represent a further violation of their rights⁵⁰

Put simply, we cannot achieve gender equity by undermining a women's ability to exercise her rights.

The law as it stands is difficult to enforce, risks racial profiling, and is ineffective in achieving its purported policy. It is impossible for a health provider to read the minds of their patient to know the reason for her decision to terminate a pregnancy. Given the rhetoric surrounding the law, Arizona's ban simply encourages doctors who fear criminal penalties to racially profile women and deny them the abortion care necessary for their well-being and health. From a purely reproductive rights perspective, sex-selective abortion bans are the beginning of a slippery slope, and open the door for politicians to further intrude into the personal health decisions of women. They set a dangerous precedent for defining what reasons are or are not acceptable for women seeking an abortion and could lead to even more restrictions on access to safe, legal reproductive health care for women. Moreover, these bans are difficult to enforce, as shown under laws prohibiting gender determination in India where a woman could have the sex of her fetus determined by one provider and seek an abortion from another provider.

Furthermore, these bans have not had a perceivable effect on the sex of children born. Sex ratios have not changed in U.S. states where the policy has become law. An empirical analysis of sex ratios at birth five years before and after sex-selective abortion bans were enacted in Illinois and Pennsylvania—the two states where the bans have been in place long enough for longitudinal study—indicates no association between the bans and changes in sex ratios at birth.⁵¹

More appropriate efforts to reduce sex-selective abortions would address gender inequality, the root cause of son preference. Such measures would provide the social and legal foundations for an environment where parents do not favor boys over girls in the first instance because women and men would have equal opportunity to be successful and to care for their family, and as a result would be seen as equally valuable. This has been shown to work in South Korea, the only country that has seen an improvement in its sex ratio. Researchers give much credit for

50. WHO, *supra* note 24, at v.

51. *Replacing Myths with Facts*, *supra* note 9, at 12.

improvement in gender inequality in South Korea to industrialization, urbanization and rapid economic development, which helped to shift underlying social norms.⁵² South Korea also saw increased female employment in the labor market, new laws and policies to improve gender equality, and awareness-raising campaigns through the media.⁵³ A policy that improves the lives of women in these ways would be a more appropriate, narrowly tailored government approach.

CONCLUSION

In the last three years, legislatures in thirty states enacted over 200 abortion restrictions—more than were enacted in the entire previous decade.⁵⁴ The swiftly growing number of sex-selective abortion bans introduced into state legislatures across the country is powerful evidence that these bans are a key part of the conservative blueprint to incrementally dissolve abortion rights. However, these bans are more than just another reproductive health barrier. They exacerbate existing health inequities faced by AAPI women. Language and cultural barriers as well as fragmented access to health insurance have resulted in disproportionately low rates of insurance and high rates of preventable disease in the AAPI community.⁵⁵ Worse still, not only do proponents of these discriminatory sex-selective abortion bans grossly misrepresent the values of the AAPI community, they also actively undermine them. According to the 2012 National Asian American Survey, 78 percent of AAPIs support some form of legal abortion and 69 percent agreed that abortion is a private matter, not a decision for the government interference.⁵⁶

Enacted on the basis of misinformation and harmful stereotypes about AAPI women, sex-selective abortions are slowly becoming one of the most dangerous challenges to the AAPI community's reproductive health. Advocates must continue to speak up and speak out about the true impact of and intent behind these bans to prevent further distorted perceptions of AAPI reproductive decision making and, more broadly, AAPI identity and

52. See WHO, *supra* note 25, at 8; see also Woojin Chung & Monica Das Gupta, *Why is Son Preference Declining in South Korea?*, World Bank Policy Research Working Paper No. 4373 (2007), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-4373>.

53. Sneha Barot, *A Problem-and-Solution Mismatch: Son Preference and Sex-Selective Abortion Bans*, 15 GUTTMACHER POLICY REVIEW 18, 21 (2012), available at <https://www.guttmacher.org/pubs/gpr/15/2/gpr150218.pdf>.

54. See Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, 17 GUTTMACHER POLICY REVIEW 9 (2014), available at <http://www.guttmacher.org/pubs/gpr/17/1/gpr170109.pdf>.

55. See Karthick Ramakrishnan & Farah Z. Ahmad, CENTER FOR AMERICAN PROGRESS, STATE OF ASIAN AMERICANS AND PACIFIC ISLANDERS SERIES: A MULTIFACETED PORTRAIT OF A GROWING POPULATION 102–06 (2014), available at <http://cdn.americanprogress.org/wp-content/uploads/2014/09/AAPISurvey-report-comp.pdf>.

56. Report pending, data available upon request. See National Asian American Survey, <http://naasurvey.com/> (last visited Feb. 6, 2015).

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values in this country.

