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AND THE EQUAL PROTECTION
CHALLENGE TO SEX-SELECTIVE
ABORTION STATUTES**

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Abstract: Several states have recently enacted statutes prohibiting the provision of an abortion on the basis of a fetus's sex (so-called sex-selective abortions). These statutes—which impose criminal sanctions on medical professionals who knowingly perform a sex-selective abortion—were justified under the pretense of allegedly curbing the sex-selective practices of Asian cultures, though critics were quick to point out that bill sponsors provided scant or no evidence of sex-selective abortions actually occurring. The statutes—at least one of which has been challenged in federal court—has, according to some, had the effect of unfairly stigmatizing Asian-Americans by relying on “invidious and unfounded” stereotypes, which are memorialized in the legislative history of the statutes. This Essay examines the equal protection challenge to these statutes, as well as the standing obstacle that the plaintiffs must overcome.

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RACIALIZING ABORTION: STANDING AND THE EQUAL PROTECTION CHALLENGE TO SEX-SELECTIVE ABORTION STATUTES

*Joshua D. Lee**

INTRODUCTION

Several states have recently enacted statutes prohibiting the provision of an abortion on the basis of a fetus's sex (so-called sex-selective abortions).¹ These statutes—which impose criminal sanctions on medical professionals who knowingly perform a sex-selective abortion—were justified under the pretense of allegedly curbing the sex-selective practices of Asian cultures, though critics were quick to point out that bill sponsors provided scant or no evidence of sex-selective abortions actually occurring.² The statutes—at least one of which has been challenged in federal court—has, according to some, had the effect of unfairly stigmatizing Asian-Americans by relying on “invidious and unfounded” stereotypes, which are memorialized in the legislative history of the statutes.³ This Essay examines the equal protection challenge to these statutes, as well as the standing obstacle that the plaintiffs must overcome.

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¹ See *infra* note 9 and accompanying text.

² See *infra* Part I.

³ See *infra* text accompanying notes 15–17. This Essay focuses only on sex-selective abortion statutes which target the alleged sex-selective practices of Asian cultures. The plaintiffs in the case challenging the Arizona abortion statute, *NAACP v. Horne*, No. CV13-01079-PHX-DGC (D. Ariz. Oct. 3, 2013), have also challenged the statute's ban on race-selective abortions, claiming that state legislators believe that “the high rate of abortion in the Black community proves that Black women are terminating their pregnancies in order to ‘de-select’ members of their own race.” Complaint at 7, *Horne*, No. CV13-01079-PHX-DGC.

In the landmark decision *Roe v. Wade*, the U.S. Supreme Court held that a woman has a constitutional right to decide whether or not to terminate her pregnancy, subject to a state's important interest safeguarding health, maintaining medical standards, and protecting potential life.⁴ In *Planned Parenthood v. Casey*, the Court elaborated on *Roe*'s holding in three parts: First, a woman has "the right . . . to choose to have an abortion before viability and to obtain it without undue interference from the State"; second, the State may restrict abortions after viability "if the law contains exceptions for pregnancies which endanger the woman's life or health"; and third, "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."⁵ In 2003, the Court commented on *Roe*, stating the decision "confirmed once more that the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person."⁶

Part I briefly discusses the background of several states' sex-selective abortion legislation and the constitutional challenge to Arizona's statute currently on appeal in the Ninth Circuit in *NAACP v. Horne*.⁷ Part II examines the issue of standing, the ground on which the district court dismissed the Arizona case. Part III will then discuss the equal protection challenge to states' sex-selective abortion statutes under the Supreme Court precedent regarding facially neutral laws with an allegedly discriminatory purpose.

I.

BACKGROUND ON SEX-SELECTIVE ABORTION STATUTES

On March 26, 2014, South Dakota Governor Dennis Daugaard signed a bill that prohibits any person from performing of an abortion on the basis of a fetus's sex.⁸ South Dakota is now the eighth state in the United States to pass legislation banning sex-selective abortions.⁹ Describing the bill's purpose, South Da-

⁴ *Roe v. Wade*, 410 U.S. 113, 153 (1973), *holding modified by* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

⁵ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992). For an analysis of the constitutionality of sex-selective abortion statutes under *Roe* and *Casey*, see Thomas J. Molony, *Roe, Casey, and Sex-Selection Abortion Bans*, 71 WASH. & LEE L. REV. 1089 (2014). For an argument that race- and sex-selective abortion statutes are an unconstitutional motive-based abortion restriction, see Justin Gillette, Comment, *Pregnant and Prejudiced: The Constitutionality of Sex- and Race-Selective Abortion Restrictions*, 88 WASH. L. REV. 645 (2013).

⁶ *Lawrence v. Texas*, 539 U.S. 558, 565 (2003).

⁷ *NAACP v. Horne*, No. 13-17247 (9th Cir. filed Nov. 4, 2013). Briefs have been filed by both parties to the litigation. The plaintiff-appellants' reply brief is due July 14, 2014. *Id.* (docket entry no. 32).

⁸ *Governor Signs Several More Bills into Law*, S.D. STATE NEWS (Mar. 26, 2014), <http://news.sd.gov/newsitem.aspx?id=15893>.

⁹ The other states are Arizona, Illinois, Kansas, North Carolina, North Dakota, Oklahoma, and Pennsylvania, and similar legislation has been introduced in over twenty states. Issue Brief,

kota Representative Don Haggar (R-Dist. 10), one of the bill's sponsors, said the measure was necessary to prevent the abortion of females by ethnic minorities known to practice sex selection in their decision-making—in particular, those of Asian descent.¹⁰ According to Representative Haggar, “Ethnic backgrounds that are known to practice sex selection account for up to 3.9% of all abortions in South Dakota.”¹¹ On the other hand, critics of the act have argued these legislators are “pushing a phony issue.”¹² Fellow South Dakota state representative Peggy Gibson said, “I did not hear the sponsor of the bill give one iota of evidence that a [sex-selective] abortion has taken place in South Dakota. This bill . . . is a solution to a problem that doesn't exist.”¹³ And while the South Dakota bill has now passed into law, a similar statute in Arizona is currently being challenged in federal court.

In May 2013, the NAACP and the National Asian Pacific American Women's Forum (NAPAWF), represented by the ACLU, challenged Arizona's sex-selective abortion statute¹⁴ in federal district court, claiming, in part, that the statute violates the Equal Protection Clause of the Fourteenth Amendment by stigmatizing and discriminating against Asian-American women in their decision to seek or obtain abortions.¹⁵ Like the South Dakota statute, the plaintiffs' complaint alleged the Arizona legislation was justified, in part, on the fact that “future immigration of API [(“Asian or Pacific Islander”)] women to Arizona will make sex-selection abortion an issue within the state.”¹⁶ According to the plain-

Race and Sex Selective Abortion Bans: Wolves in Sheep's Clothing, NAT'L ASIAN PAC. AM. WOMEN'S F., July 2013, http://napawf.org/wp-content/uploads/2009/10/PRENDAIssueBrief_8.5_Final.pdf; Aubrey Temple, *N.C. Law Prohibits Sex-Selective Abortions, Allows Trial for in Utero Murder*, CHRON. (Durham), Jan. 21, 2014, <http://www.dukechronicle.com/articles/2014/01/21/nc-law-prohibits-sex-selective-abortions-allows-trial-utero-murder>. In 2010, the Supreme Court of Oklahoma ruled its state's sex-selective abortion ban unconstitutional under the state constitution's single subject rule. *Nova Health Sys. v. Edmondson*, 233 P.3d 380, 382 (Okla. 2010).

¹⁰ See Molly Redden, *GOP Lawmaker: We Need to Ban Sex-Selective Abortions Because of Asian Immigrants*, MOTHER JONES (Feb. 25, 2014, 7:00 AM), <http://www.motherjones.com/politics/2014/02/south-dakota-stace-nelson-ban-sex-based-abortions-because-asian-immigrants> (“[Rep. Haggar] then wrote, ‘1.1% or approximately 9,200 South Dakotans come from ethnic backgrounds that are known to practice sex selection,’ and linked to US Census data estimating that in 2012, 1.1 percent of South Dakotans were of Asian descent.”). Rep. Haggar did not say that, it was Spencer Cody, VP of South Dakota Right to Life testifying with Powerpoint before judiciary committee.

¹¹ *Id.* By this, the Representative simply seems to mean that 3.9% of all abortions performed in South Dakota were obtained by individuals of Asian descent. Again, this is from Cody's powerpoint not something that Haggar said.

¹² *See id.*

¹³ *Id.*

¹⁴ ARIZ. REV. STAT. ANN. § 13-3603.02 (West).

¹⁵ Complaint at 13, *NAACP v. Home*, No. CV13-01079-PHX-DGC (D. Ariz. Oct. 3, 2013), available at http://www.aclu.org/files/assets/naacp_complaint.pdf.

¹⁶ *Id.* at 7.

tiffs, this justification amounts to nothing more than “invidious racial stereotypes about the reasons minority women seek abortion care.”¹⁷

On October 3, 2013, the district court dismissed the complaint for lack of subject matter jurisdiction because, according to the court, the plaintiffs lacked standing to bring suit.¹⁸ The matter is now on appeal before the Ninth Circuit.¹⁹ As of this writing, it appears there are no other pending challenges to sex-selective abortion statutes.²⁰

II.

STANDING FOR STIGMATIC INJURIES UNDER *ALLEN V. WRIGHT*: AN UNCLEAR LEGAL STANDARD

Challengers of the sex-selective abortion statutes, as evidenced by the district court’s dismissal in the *NAACP v. Horne*, face a significant obstacle in demonstrating standing. The Supreme Court has articulated a three-part test for standing under Article III of the U.S. Constitution: *Injury-in-fact*, *Causation*, and *Redressability*.²¹ The *injury* prong requires the “invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.”²² *Causation* means that “the injury fairly can be traced to the challenged action . . . and has not resulted from the independent action of some third party not before the court.”²³ Finally, *redressability* requires that the “prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.”²⁴

The most problematic prong for the challengers will likely be establishing a concrete and particularized injury. In *Allen v. Wright*, the Supreme Court held that the parents of black children attending public schools did not have standing to challenge the procedures of Internal Revenue Service in providing tax-exempt status to racially discriminatory private schools.²⁵ While recognizing that “stigmatizing injury caused by racial discrimination” is one of the “most se-

¹⁷ *Id.* at 2.

¹⁸ *NAACP v. Horne*, No. CV13-01079-PHX-DGC, slip op. at 12 (D. Ariz. Oct. 3, 2013), available at http://www2.bloomberglaw.com/public/desktop/document/National_Association_for_the_Advancement_of_Colored_People_et_al_.

¹⁹ *NAACP v. Horne*, No. 13-17247 (9th Cir. filed Nov. 4, 2013).

²⁰ A challenge to North Dakota’s sex-selective abortion statute was dismissed without prejudice at the plaintiff’s request. *Federal Judge Overturns North Dakota Abortion Law*, JURIST (Apr. 17, 2014, 7:30 AM), <http://jurist.org/paperchase/2014/04/federal-judge-overturns-north-dakota-abortion-law.php>.

²¹ *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 663–64 (1993).

²² *Id.* at 663 (internal quotation marks omitted).

²³ *Id.* (internal quotation marks omitted).

²⁴ *Id.* at 663–64 (internal quotation marks omitted).

²⁵ 468 U.S. 737, 754 (1984).

rious consequences of discriminatory government action,” the Court held that a stigmatic injury alone would not confer standing on a plaintiff, *unless* those persons are also “personally denied equal treatment by the challenged discriminatory conduct.”²⁶ The Court elaborated on this requirement in *Northeastern Florida Contractors v. Jacksonville*:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The “injury in fact” in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.²⁷

In that case, an association of Florida contractors brought an equal protection challenge to a Jacksonville ordinance which required that ten percent of the money spent annually on city contracts be set aside for businesses owned by primarily minority individuals.²⁸ While the contractors had not directly competed for the contracts set aside (and, thus, were not actually injured by being denied said projects), the contractors argued that they “would have . . . bid on . . . designated set aside contracts but for the restrictions imposed by the ordinance.”²⁹ Holding that the contractors had standing to challenge the ordinance, the Court stated, “To establish standing, therefore, a party challenging a set-aside program like Jacksonville’s need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.”³⁰

The plaintiffs in *Horne* relied, in part, on *Northeastern Florida Contractors* for the proposition that a stigmatic injury is enough to establish standing,³¹ an argument that the district court rejected because the plaintiffs had failed to show they were “actually impacted” by the law challenged, as required by *Northeastern*.³² As the doctrine stands, showing an injury in this context will likely be

²⁶ *Id.* at 755 (internal quotation marks omitted). For background on the Court’s decisions regarding stigmatic injury as a basis for standing and an argument that stigmatic injuries should be a sufficient basis, see generally Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417 (2007). See also Note, *Expressive Harms and Standing*, 112 HARV. L. REV. 1313 (1999) (proposing doctrinal solutions for the coherent treatment of “expressive” injuries).

²⁷ *Ne. Fla. Contractors*, 508 U.S. at 666.

²⁸ *Id.* at 659.

²⁹ *Id.* (internal quotation marks omitted).

³⁰ *Id.* at 666.

³¹ *NAACP v. Horne*, No. CV13-01079-PHX-DGC, slip op. at 8 (D. Ariz. Oct. 3, 2013).

³² *Id.* at 9 (“*Northeastern* illustrate[s] the additional showing required – that a plaintiff must actually have been impacted by the law he or she challenges, such as in the denial of equal Social Security benefits or the right to bid on a city contract.”).

difficult for the challengers without evidence of some cognizable denial of equal treatment. They are not alleging that they were denied access to abortions or that access to care was made more difficult by the law. Unlike the value of the set-aside contracts in *Northeastern*, the challengers can point to no tangible benefit for which they were denied equal treatment under the statute.³³

The denial of *tangible* benefit is not, however, the standard for establishing an injury, as the brief of amici curiae Caitlin Borgmann and Priscilla Smith,³⁴ filed with the Ninth Circuit in *Horne*, points out. Amici look to another Supreme Court case, *Lujan v. Defenders of Wildlife*,³⁵ for guidance. In *Lujan*, a wildlife conservation organization sued the Secretary of the Interior for an injunction to interpret the Endangered Species Act (ESA) as applying to federally funded projects in foreign countries.³⁶ The plaintiffs' theory in *Lujan* was that the Secretary's latest interpretation of the ESA would increase the extinction rate of certain endangered species overseas—and that this would, thus, deprive the plaintiffs' members from being able to enjoy certain animals.³⁷ The Court held the plaintiffs had failed to establish its members would be “directly” and “imminently” affected by the regulation; *however*, the Court recognized that the “the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of standing.”³⁸

Amici Borgmann and Smith note that what the Court is trying to avoid is a situation in which “anyone who goes to see Asian elephants in the Bronx Zoo” has standing to sue.³⁹ In *Allen*, the Court avoided recognizing purely stigmatic injuries because conferring standing in such cases “would extend nationwide to all members of the particular racial groups against which the Government was alleged to be discriminating . . . regardless of the location of that school.”⁴⁰ “A black person in Hawaii,” posits the Court, “could challenge the grant of a tax exemption to a racially discriminatory school in Maine[,] . . . transform[ing] the federal courts into ‘no more than a vehicle for the vindication of the value inter-

³³ This is, basically, the primary argument set forth in the State of Arizona's response brief filed with the Ninth Circuit. See Answering Brief at 8–14, *NAACP v. Horne*, No. 13-17247 (9th Cir. filed Nov. 4, 2013).

³⁴ Caitlin Borgmann is a Professor of Law at CUNY School of Law. *Caitlin Borgmann*, CUNY SCHOOL OF LAW, <http://www.law.cuny.edu/faculty/directory/borgmann.html> (last visited June 15, 2014). Priscilla Smith is an Associate Research Scholar in Law at Yale Law School. *Priscilla Smith*, YALE LAW SCHOOL, <http://www.law.yale.edu/faculty/PSmith.htm> (last visited June 15, 2014). Their brief was filed with the Ninth Circuit on March 19, 2014.

³⁵ 504 U.S. 555 (1992).

³⁶ *Id.* at 558–59.

³⁷ *See id.* at 563–64.

³⁸ *Id.* at 562–63.

³⁹ *See* Amici Curiae Brief of Constitutional Scholars at 10, *NAACP v. Horne*, No. 13-17247 (9th Cir. Nov. 4, 2013) (quoting *Lujan*, 504 U.S. at 566).

⁴⁰ *Allen v. Wright*, 468 U.S. 737, 756 (1984).

ests of concerned bystanders.”⁴¹ According to amici, the claims brought by the NAACP and NAPAWF are “not generalized claims of abstract stigma, brought by . . . ‘bystanders.’”⁴² Rather, the claim is that the decisions of Asian-American women seeking to end pregnancy will become “automatically suspect solely because of their race” because the process of seeking an abortion has been “tainted by legislative assumptions about why they are seeking abortions.”⁴³

One argument might be that Asian-American women will face unequal treatment by doctors providing abortions because of the potential criminal and civil liabilities that may be imposed on them. The Arizona statute makes it a “class 3” felony to knowingly perform a sex-selective abortion and also imposes a civil fine of not more than \$10,000 on physicians, nurses, and other medical professionals for knowingly *not* reporting known violations of the statute.⁴⁴ Being aware of the legislative history, physicians may be hesitant to perform abortions for Asian-American women out of fear of prosecution after the fact—even if the sex-selective abortion was not knowingly performed. Whether the Ninth Circuit will find such an argument persuasive is unclear. It is clear, however, that in this type of scenario, allowing a suit to proceed would *not* confer standing on Asian-Americans nationwide based on some abstract stigmatic harm. Rather, only Asian-American women (as targets of the legislation) seeking an abortion from a doctor who may harbor reservations about performing an abortion because of potential liability would have standing.

A purely hypothetical injury alone, however, is likely insufficient to establish standing because the plaintiffs must demonstrate a “realistic danger of sustaining a direct injury as a result of the [policy]’s operation or enforcement.”⁴⁵ Moreover, the Ninth Circuit has stated that it “must consider the facts as they existed at the time that the complaint was filed.”⁴⁶ In *Scott v. Pasadena Unified School District*, parents challenged a “weighted” admissions lottery for certain magnet schools, which took into account sex, race, socioeconomic status, and other factors.⁴⁷ The weighted lottery was to be used only if there were insufficient spaces for all applicants; when it was challenged, the lottery had yet to be utilized. The Ninth Circuit dismissed the plaintiff’s claim because the court found their “hypothetical injury too speculative to support standing.”⁴⁸ Thus, in order to succeed on the argument outlined in this Part, the plaintiffs in *Horne* may need to actually produce a doctor or nurse who can attest that the Arizona statute caused

⁴¹ *Id.*

⁴² See Amici Curiae Brief of Constitutional Scholars at 11, *Horne*, No. 13-17247.

⁴³ See *id.* at 12–13.

⁴⁴ ARIZ. REV. STAT. ANN. § 13-3603.02 (West).

⁴⁵ See *Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 655 (2002) (alteration in original).

⁴⁶ *Id.*

⁴⁷ *Id.* at 649–51.

⁴⁸ *Id.* at 659.

them to refuse or be reluctant to perform certain abortions out of fear of prosecution or civil penalty. Evidence of barriers to abortion access may help buttress his argument.⁴⁹

In one post-*Allen* case, the Ninth Circuit reversed a district court finding of *no standing* for a “stigmatic” injury in a case brought under the Fair Housing Act (FHA).⁵⁰ In that case, *Harris v. Itzhaki*, the Ninth Circuit applied the “very liberal” standing requirement (the “Article III minima of injury in fact”) that, under the FHA, a plaintiff “need only allege that as a result of the defendant’s discriminatory conduct he has suffered a *distinct and palpable injury*.”⁵¹ In *Harris*, the local fair housing council assigned two “test” renters—one white and one black—to inquire at the defendant’s complex about the same vacancy to determine whether the defendant treated the potential renters differently based on race.⁵² The court held the plaintiff—the only black tenant in the complex—could bring a claim based solely on an indirect injury for alleged differential treatment of the rental testers because she had suffered “a distinct and palpable injury resulting from the differential treatment, unlike the plaintiffs in *Allen*.”⁵³ According to the court, this injury came in the forms of an eviction notice given to the plaintiff, despite the tenant’s claim to have followed the “accepted practice at the apartment” for paying rent, and an allegedly discriminatory statement made by the landlord’s assistant.⁵⁴ Yet, it appears the plaintiff did not suffer a material detriment from either of these alleged injuries (that is, the plaintiff was neither evicted nor suffered any physical injury as a result of the assistant’s remarks). In other words, it might fairly be said that these injuries were purely stigmatic, but nonetheless, the Ninth Circuit found the plaintiff’s case could proceed.

It is possible that the FHA statutory scheme is more liberal with respect to standing, making comparison to the Arizona abortion case inapt.⁵⁵ The Supreme Court in *Lujan*, however, indicated that the minimum showing required for Article III standing cannot be congressionally expanded by statute.⁵⁶ Thus, in theory, the statutory context of the case should not be material in analyzing the “Article III minima of injury in fact.” Unfortunately, where this leaves us is very unclear. If, however, the NAACP and NAPAWF are able to succeed on standing, the case will proceed to the equal protection challenge.

⁴⁹ See, e.g., *infra* notes 72–80 and accompanying text.

⁵⁰ *Harris v. Itzhaki*, 183 F.3d 1043 (9th Cir. 1999).

⁵¹ *Id.* at 1049–50 (emphasis added) (internal quotations omitted).

⁵² *Id.* at 1048–49.

⁵³ *Id.* at 1050.

⁵⁴ See *id.* at 1048–49, 1052, 1054.

⁵⁵ See *supra* note 53 and accompanying text.

⁵⁶ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992).

III.
EQUAL PROTECTION CHALLENGE: A FACIALLY NEUTRAL LAW
WITH DISCRIMINATORY MOTIVATION & EFFECT

The Fourteenth Amendment provides, “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵⁷ Since *Brown v. Board of Education*,⁵⁸ the Supreme Court has applied the equal protection clause of the Fourteenth Amendment to strike down state action amounting to invidious racial discrimination. In *Washington v. Davis*, the Supreme Court held that a facially neutral statute may not be applied “so as invidiously to discriminate on the basis of race.”⁵⁹ To successfully establish an equal protection violation, a plaintiff must show that the defendant acted with discriminatory purpose⁶⁰ and that the law had a discriminatory effect.⁶¹ Once the plaintiff makes this two-fold showing, the burden then shifts to the state to demonstrate that it would have taken the same action regardless of race.⁶² If the state does not make this showing, the court should strike down the law as an equal protection violation.⁶³

A. Discriminatory Effect

The Supreme Court has never held “that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”⁶⁴ Thus, some discriminatory effect is necessary for plaintiffs to succeed on an equal protection challenge. The Ninth Circuit has stated that an analysis of discriminatory effect will “depend upon the legal and factual environment in which [the allegation or finding of discriminatory effect] is made,” but that the concept is “relatively elementary, straightforward, and capable of application in a wide variety of factual contexts.”⁶⁵

According to the plaintiffs’ complaint in *Horne*, the discriminatory impact of the law is that it “demeans, stigmatizes, and discriminates” Asian-American women in their decision to end a pregnancy.⁶⁶ The plaintiffs have not alleged that “their members have been or will be denied abortions or other medical care.”⁶⁷ It is unclear whether a stigmatic effect on the plaintiffs is enough to

⁵⁷ U.S. CONST. amend. XIV, § 1.

⁵⁸ 349 U.S. 294 (1955).

⁵⁹ See 426 U.S. 229, 241 (1976).

⁶⁰ *Id.* at 239–40.

⁶¹ See *Wayte v. United States*, 470 U.S. 598, 608 (1985).

⁶² *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

⁶³ See *id.* at 233.

⁶⁴ *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

⁶⁵ *De La Cruz v. Tormey*, 582 F.2d 45, 52 (9th Cir. 1978).

⁶⁶ Complaint at 12–13, *NAACP v. Horne*, No. CV13-01079-PHX-DGC (D. Ariz. Oct. 3, 2013).

⁶⁷ Appellants’ Brief at 44, *NAACP v. Horne*, No. 13-17247 (9th Cir. Nov. 4, 2013).

satisfy the discriminatory effect requirement. The Supreme Court has yet to recognize a cognizable equal protection challenge where a discriminatory purpose has been proven, but only a stigmatic discriminatory effect is alleged.⁶⁸ In *Palmer v. Thompson*, the Court indicated that it would be reluctant to strike down a law if it could simply be re-enacted for a different, but valid reason—thus, some tangible discriminatory effect may be necessary.⁶⁹

In *United States v. Armstrong*, a case involving the racially discriminatory prosecution of criminal defendants, the Supreme Court held complainants must show evidence that “similarly situated” parties of other races could have been prosecuted, but were not, to establish a discriminatory effect.⁷⁰ The Ninth Circuit has interpreted this to mean that the standard for proving discriminatory effect—at least, in the context of selective enforcement of criminal laws—“is a demanding one.”⁷¹ Under this kind of analysis, plaintiffs would have the difficult job of demonstrating that an Asian-American woman, or group of women, was denied or impeded access to an abortion where a similarly situated woman of another race was not. Plaintiffs would presumably have to produce, for example, a physician who refused to perform an abortion on an Asian-American woman out of fear of criminal prosecution under the Arizona statute—even though the woman alleged that son preference was not the reason for her abortion decision.

Some evidence of denial of access may be found in an annual report published by the Arizona Department of Health Services (Department). Since at least 2002, the Department has gathered abortion data on the proportion, rates, and ratios of abortions by race and ethnicity of Arizona residents.⁷² According to the report, from 2002 to 2010, the percentage of total abortions⁷³ obtained by Asian or Pacific Islander residents has hovered between 2.30% and 4.33%.⁷⁴ In 2011, however, that number dropped to 0.35%; and in 2012, 0.58%.⁷⁵ Likewise, the

⁶⁸ Cf. *Palmer v. Thompson*, 403 U.S. 217, 224 (1971) (“[N]o case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it.”).

⁶⁹ See *id.* at 225 (“If the law is struck down [because of the bad motives of its supporters], rather than because of its facial content or effect, it would presumably be valid as soon as the legislature . . . re-passed it for different reasons.”).

⁷⁰ See *United States v. Armstrong*, 517 U.S. 456, 469 (1996).

⁷¹ *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 920 (9th Cir. 2012) (quoting *Armstrong*, 517 U.S. at 463).

⁷² ARIZ. DEP’T OF HEALTH SERVS. ABORTIONS IN ARIZONA: 2012 ABORTION REPORT 16 (2013), available at <http://azdhs.gov/diro/reports/pdf/2012-arizona-abortion-report.pdf>.

⁷³ “Percentages are calculated using the total number of reported abortions as the denominator and the number of reported abortions for a specific ethnicity and/or race as the numerator.” *Id.* at 12 tbl.4.

⁷⁴ *Id.*

⁷⁵ *Id.*

abortion rates⁷⁶ of API residents dropped from between 5.24%–14.7% (2003–2010) to 0.92% in 2011 and 1.57% in 2012.⁷⁷ The abortion ratio⁷⁸ of API residents dropped from between 77 and 170 down to a mere eight in 2011 and 21 in 2012.⁷⁹ This stark decline in the proportion, rates, and ratio of abortions obtained by API residents is certainly conspicuous. It should be noted though that as of 2011, the Department notes “rates and ratios should be interpreted with caution” due to the addition of “Multiple Race” and “Unknown” categories in the data set.⁸⁰ Other factors may be playing a role in the declining numbers; however, plaintiffs can use this data as a starting point for demonstrating that the statute is imposing a bar on access to abortions, amounting to a discriminatory effect.

B. Discriminatory Purpose

According to the Supreme Court, discriminatory purpose requires more than simply an awareness of the consequences that might result from the challenged conduct; “it implies that the decisionmaker, in this case a state legislature, selected . . . a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.”⁸¹ In *Arlington Heights v. Metropolitan Housing Development*, the Court observed, with regard to proving discriminatory motivation:

The legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body . . . In some extraordinary instances the members might be called to the stand at trial to testify concerning the purpose of the official action.⁸²

The plaintiffs in *Horne* point to the legislative history of the Arizona statute, which they allege indicates the statute was justified, in part, on the fact “that the future immigration of API women to Arizona will make sex-selection abortion an issue within the state.”⁸³ Yet, the plaintiffs noted that the sponsors of the bill “did not identify any example of a race- or sex-selective abortion that

⁷⁶ “Calculated using the number of abortions obtained by women, ages 15-44 in a given race and/or ethnic group per 1,000 women in the same group.” *Id.* at 12 tbl.4.

⁷⁷ *Id.*

⁷⁸ “Calculated using the number of abortions obtained by women, ages 15-44 in a given race and/or ethnic group per 1,000 live births to women in the same group.” *Id.* at 12 tbl.4.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

⁸² *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). The Court also states discriminatory purpose can be shown through statistical evidence of discriminatory impact (though this must be a “stark” showing) or the history surrounding the government action. *Id.* at 266, 267.

⁸³ Complaint at 7, *NAACP v. Horne*, No. CV13-01079-PHX-DGC (D. Ariz. Oct. 3, 2013).

took place in Arizona.”⁸⁴ The preamble to a similar and nominally identical federal bill—introduced by Representative Trent Franks (R-AZ) in 2011 as the Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act—primarily cited international evidence of sex selective abortions because of the scarcity of such evidence in the United States.⁸⁵ In one domestic study cited in the federal legislation, researchers using U.S. Census data identified evidence of son preference in Indian, Chinese, and Korean families in second- and third-child births where the older children were daughters.⁸⁶ However, the study did not identify the causes of the preference, and researchers noted that because the studied communities constitute less than two percent of the U.S. population, “the effect on the breeding population sex ratio is small.”⁸⁷

As in Arizona, sponsors of the recently enacted South Dakota statute have cited the alleged views of Asian cultures on sex-selective abortions as the justification for enactment:

“Many of you know I spent 18 years in Asia . . . And sadly, I can tell you that the rest of the world does not value the lives of women as much as I value the lives of my daughters.”⁸⁸

“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.”⁸⁹

As troubling as these statements may be, it would be a mistake to automatically conflate the use of racial and cultural data in passing a bill with a discriminatory motivation to enact the law. Discriminatory purpose seems quite clear where the state legislature intended to specifically make Asian-American

⁸⁴ *Id.* But see Brief of Amicus Curia Congressman Trent Franks et al. at 19–21, *NAACP v. Horne*, No. 13-17247 (9th Cir. filed May 19, 2013) (citing studies which examine sex ratios of children born to Asian parents in the United States and identify evidence of sex selection).

⁸⁵ See Sneha Barot, *A Problem-and-Solution Mismatch: Son Preference and Sex-Selective Abortion Bans*, *GUTTMACHER POL'Y REV.*, Spring 2012, at 18, 21, available at <http://www.guttmacher.org/pubs/gpr/15/2/gpr150218.pdf>; see also Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011, H.R. 3541, 112th Cong. § 2(a) (2011).

⁸⁶ See Barot, *supra* note 85, at 21.

⁸⁷ See Douglas Almond & Lena Edlund, *Son-biased Sex Ratios in the 2000 United States Census*, 105 *PROC. NAT'L ACAD. SCI. U.S.A.* 5681, 5681–82 (2008), available at <http://www.pnas.org/content/105/15/5681.full>.

⁸⁸ See Molly Redden, *supra* note 10 (statement of Representative Stacey Nelson).

⁸⁹ *Id.* (statement of Representative Don Haggart).

women's access to abortions more difficult or impossible. Yet, that does not seem to be the case here. The state may argue (and, indeed, demonstrate) that these women are no less capable of obtaining abortions, and are certainly not precluded from obtaining such care, than any other racial group—so long as their intent is not to obtain a sex-selective abortion. This, the state might argue, is a racially neutral motivation despite the state's reliance on racially- or culturally-specific data in passing the bill.

Thus, an important inquiry may be whether the Arizona law has, in medical practice, caused more Asian-American women to be denied access to abortions because of an increased suspicion among medical professionals that these women are obtaining sex-selective abortions. In other words, the plaintiffs, in addition to citing legislative history, may be advised also to demonstrate a statistical pattern of a discriminatory effect for the strongest argument for a discriminatory purpose.⁹⁰ While this data does not appear to be readily available, a statistically significant number of Asian-American women being impeded or denied access to abortions would be very useful evidence in establishing discriminatory motivation, as well as evidence of discriminatory effect.⁹¹ Of course, the Supreme Court has stated that a showing of discriminatory impact is not determinative in establishing discriminatory purpose, except in the rare case of a "clear pattern, unexplainable on grounds other than race."⁹² Thus, a combination of legislative history and evidence of discriminatory impact will be helpful and likely necessary to succeed on a challenge.

CONCLUSION

The right to choose to terminate one's pregnancy is, in any view, a controversial issue. Nonetheless, women should—consistent with this right—have equal access to an abortion regardless of their race or country of origin. Accordingly, the racial justification for enacting sex-selective abortion statutes is deeply troubling. On the one hand, *Roe* and its progeny made clear that states have the prerogative to limit abortion access for legitimate purposes, including perhaps preventing sex-selective abortions. What a state cannot do, however, is prevent or impede access to abortion care based on racial stereotypes. If the harm to Asian-American women is purely stigmatic, the Supreme Court's precedent indicates that this injury alone is likely insufficient to confer standing on the plaintiffs or—if the case proceeds—provide an adequate basis for an equal protection challenge. If, however, the plaintiffs can demonstrate that some of these women are

⁹⁰ See *supra* note 82; *cf.* *Castaneda v. Partida*, 430 U.S. 482, 494–95 (1977) (stating that a *prima facie* case of discriminatory purpose can be made in the context of grand jury selection by showing a "substantial underrepresentation" of a racial group).

⁹¹ The plaintiffs can use the abortion data provided by the Arizona Department of Health Services as a starting point. See *supra* notes 72–80 and accompanying text.

⁹² *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

being denied abortion care by medical professionals out of fear of criminal prosecution, the court should find the statute unconstitutional. More importantly, the decision should send a strong message to the legislature that racializing legislation—where it has a discriminatory impact—cannot withstand judicial scrutiny.

