Nomination of Sarah Elizabeth Pitlyk to the United States District Court for the Eastern District of Missouri
Questions for the Record
October 2, 2019

QUESTIONS FROM SENATOR FEINSTEIN

1. In 2013, you filed an amicus brief before the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action.* Your brief supported an amendment to the Michigan constitution that banned affirmative action in public employment and education programs. (Brief for the American Civil Rights Union and the American Civil Rights Institute as Amici Curiae). In your brief, you argued that "[r]acial-preference schemes unjustly impose the costs of remedying past discrimination on individuals who have no personal responsibility for the prior wrongs."

a. Do states have a compelling interest in promoting diversity to remedy past discrimination?

"The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion). Whether measures "promoting diversity" are justified by that "compelling interest" would depend on whether those measures are "narrowly tailored" to serve the State's interest in remedying discrimination. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).

You also argued that "racial classifications threaten to undermine confidence in government by injecting racialism into state and local politics, and by causing interest groups to organize on racial lines to jockey for preferred status in racial-preference programs."

b. How do state actions aimed at remedying past discrimination "undermine confidence in government"?

The above arguments were made by a team of advocates on behalf of clients. As a judge, I would apply the law without regard to any client's interests. As a judicial nominee, I am not permitted to comment on questions that, like this one, implicate issues that are likely to arise in cases either pending or impending in federal courts. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

c. Please identify the evidence supporting your argument that state actions aimed at remedying past discrimination cause "interest groups to organize on racial lines to jockey for preferred status in racial-preference programs."

The same brief argued, on behalf of the same clients, that "racial classifications threaten to undermine confidence in government . . . by causing interest groups to

organize on racial lines to jockey for preferred status in racial-preference programs." That claim rested on observations by Supreme Court justices about the threat to democracy posed by incentivizing racialized politics:

> For example, the racial assignment schemes invalidated in *Parents Involved* risked making racial classifications into "a bargaining chip in the political process," which "threaten[ed] to reduce children to racial chits valued and traded according to one school's supply and another's demand." 551 U.S. at 797-98 (Kennedy, J., concurring in part and concurring in the judgment). Similarly, the minority set-aside at issue in *Fullilove* raised concerns that the racial preferences had become an occasion for voting blocs of legislators, organized on racial lines, to seek "a piece of the action" for their members. *Fullilove*, 448 U.S. at 539 (Stevens, J., dissenting), quoted in *Croson*, 488 U.S. at 511 (plurality opinion); *see also id.* at 536, 542. These cases illustrate the danger that "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement" could become "lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs." *Croson*, 488 U.S. at 505-06 (plurality opinion).

2. In 2016, you represented a woman who sought custody of frozen embryos in her divorce proceedings. The woman and her estranged husband had frozen embryos during their marriage, and the estranged husband wanted to dispose of the embryos in the divorce. You argued on behalf of the woman that the embryos were "human beings, not property" and that there is no "federal nor state law [that] gives the biological father or anyone else the right to direct the death of his children - embryonic, gestational, or otherwise." (Appellant's Opening Brief, *McQueen v. Gadberry*).

Please identify the provisions of Missouri law that impose criminal penalties for the disposal of frozen embryos.

The brief my firm filed on behalf of a mother who sought custody of frozen embryos she and her ex-husband had created so that she could bring them to term did not rely on any laws imposing criminal penalties for the disposal of frozen embryos. We argued that it was error for the trial court to treat the embryos as marital property in a marital dissolution, rather than as human persons, because Missouri has a statute that specifies that human life begins at conception and that unborn children are to be treated as persons under the law. We further argued that the trial court erred by allowing the father of the embryos to prevent their mother from implanting them when no other law allows a father to countermand a mother's interest in the welfare of her children.

2. From 2018 to 2019, you defended the state of Iowa in a challenge to an Iowa law banning abortion at approximately 6-8 weeks. (*Planned Parenthood of the Heartland Inc. v. Reynolds*).

a. Please describe the nature of your work defending the state of Iowa in this case.

I participated in crafting our initial litigation strategy and in drafting a Motion to Dismiss, which we later withdrew in light of an intervening Iowa Supreme Court decision. Some of my colleagues with the Thomas More Society later defended against a Motion for Summary Judgment, but I was not involved in that stage of the litigation.

b. How did you come to represent Iowa in this case?

The Iowa Attorney General disqualified himself from defending the fetal heartbeat bill on behalf of the Governor and the State of Iowa. After consulting with the Governor's office and legislators, the Iowa Attorney General recommended that the Iowa Executive Council authorize the appointment of the Thomas More Society to represent the State in this litigation. The Thomas More Society agreed to handle the litigation on a *pro bono* basis.

c. What legal arguments did you make on behalf of the state of Iowa?

We moved to dismiss Petitioners' claims, which were all based on the Iowa Constitution, on three grounds:

- Iowa courts had not yet decided whether the Iowa Constitution implies a right to abortion, and they did not have to decide it then. To do so would violate jurisprudential norms against resolving unnecessary constitutional issues and issuing advisory opinions.

- The Iowa Constitution contained no fundamental due process right to abortion.

- Petitioners did not have standing to assert an equal protection claim, and they had made no plausible equal protection argument.

Shortly after submission of the State's Motion to Dismiss, the Iowa Supreme Court found a fundamental right to abortion in the Iowa Constitution in a separate case; accordingly, the State withdrew its Motion to Dismiss.

3. In 2019, you filed amicus briefs in three cases in support of a new rule issued by the Department of Health and Human Services (HHS) entitled "Compliance with Statutory Program Integrity Requirements." This new rule, known as the Title X "gag rule," prohibits Title X providers from discussing abortion with patients and requires Title X providers to establish separate facilities for family planning and abortion care. This new rule has caused dozens of Title X providers to withdraw from the program, thereby limiting access to quality health care for low-income families.

In your briefs, you argued that the Title X gag rule was justified because there are "well-founded" concerns that "Title X recipients are improperly using federal funds to subsidize abortion" and that "instances of such abuse are widespread, well-documented, and involve many

millions of dollars." (Brief of Amicus Curiae in Support of Defendants-Appellants, *California v. Azar*, *Oregon v. Azar*, *Washington v. Azar*).

Please identify all evidence supporting your argument that there is "widespread" abuse of Title X grants by providers.

This question is premised on a misstatement of our argument. In briefs filed on behalf of the Susan B. Anthony List supporting the U.S. Department of Health and Human Services' (HHS) prerogative to promulgate new Title X regulations, we argued that "widespread, well-documented documented" abuse of federal funds by abortion providers in *another* context justifies HHS's concern that the same providers might misuse Title X funds. In support of this argument, we presented data about the abuse of funds by abortion providers in the Medicaid context. We also noted facts provided by HHS suggesting that Title X funds are more susceptible to un-detected abuse than the funds these providers did abuse in a different context. Finally we cited case law suggesting that evidence of abuse of a similar kind is relevant to an agency's assessment of risk of future abuse.

5. In a May 2019 interview, you said that the Ninth Circuit Court of Appeals is "sympathetic to liberal causes." (The Lars Larson Show, May 2019).

What are the "liberal causes" that the Ninth Circuit is "sympathetic to"?

The premise of this question is false. In response to a question from the host of a radio program about whether the litigants in certain challenges to the new Title X regulations might have engaged in "judge shopping," I stated that a "great virtue of our system" is that no litigant can hand-select a judge; the most litigants can do is bring lawsuits in venues where they think they might be more likely to find a sympathetic judge. Then I noted that the first three challenges to the new Title X regulations were brought in the Ninth Circuit, which I acknowledged was "***reputed to be*** sympathetic to liberal causes," but I specifically disclaimed any knowledge of the motivations of the litigants in the cases we were discussing.

6. In 2018, you filed brief an amicus before the Supreme Court in *Box v. Planned Parenthood of Indiana* in support of an Indiana law that banned abortion based on a fetus's race, sex, or disability. (Brief of Amici Curiae in Support of Petitioners, *Box v. Planned Parenthood of Ind. and Ky.*).

a. In your brief, you argued that the "modern abortion industry…target[s] ethnic minorities."

i. What is the "modern abortion industry"?

"Modern abortion industry" is a collective term for entities that currently provide abortions. It would encompass those entities that would be eligible for membership in the National Abortion Federation, which describes itself as "the professional association of abortion providers." *See* https://prochoice.org/about-naf/. The word "modern" distinguishes those currently providing abortions from

those responsible for the origins of the industry, whom we discuss separately in the brief.

ii. Please identify all evidence supporting your assertion that "ethnic minorities" are "targeted" for abortion care.

The argument was based on demographic, geographic, and revenue data and analyses thereof. The brief includes citations to the primary sources upon which the arguments rested. I have attached hereto a copy of that brief.

b. You also argued that there must be a "correlation between increased access to abortion services and poorer health outcomes." Please identify all peer-reviewed, scientific evidence that supports this argument.

Please see my response to Question 6.a.ii.

c. You argued that "there is every reason to believe that racism plays a profound role in the delivery of abortion services." What is the factual basis for this argument?

Please see my response to Question 6.a.ii.

7. Since 2015, you have represented the Center for Medical Progress (CMP) and David Daleiden in a lawsuit filed by Planned Parenthood stemming from Daleiden's illegal filming of Planned Parenthood officials. Daleiden altered the footage he illegally obtained of Planned Parenthood officials in a manner that falsely implicated Planned Parenthood in illegal activity. Twenty states investigated the claims made in Daleiden's altered videos, but no states found that Planned Parenthood had engaged in wrongdoing.

In 2018, you filed a petition for a writ of certiorari to the Supreme Court in this case where you argued that "[l]ike the animal agriculture industry, merely publishing the reality of what goes on causes the public to become uncomfortable. But that does not mean that the industry has suffered a legally cognizable harm." (Petition for Writ of Certiorari, *Center for Medical Progress v. Planned Parenthood Federation of America*).

a. At the time you filed this brief, were you aware that David Daleiden had altered the footage he illegally obtained of Planned Parenthood to falsely suggest that Planned Parenthood was engaged in wrongdoing?

I have been Mr. Daleiden's attorney only since January 2017, when I joined the Thomas More Society, but since then I have represented him in several lawsuits arising from the "Human Capital Project," CMP's 30-month undercover investigation into illegal practices in the fetal tissue procurement industry. As Mr. Daleiden's attorney, I of course may not disclose anything that is protected by attorney-client privilege or that is subject to a protective order or injunction in pending litigation, but I will do my best to answer this and the next question within those constraints.

It has never been my belief that the video footage produced as part of the Human Capital Project has been in any way falsified. In the six lawsuits—four civil, two criminal—in which the Thomas More Society has defended Mr. Daleiden, no plaintiff or prosecutor has brought a single claim that relies on the content of the videos being false (e.g., libel or slander).

Whether the videos provide evidence of wrongdoing on the part of Planned Parenthood is a matter that is both under investigation by law enforcement and the subject of ongoing litigation and political controversy; therefore I cannot comment on it here. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

b. At the time you filed this brief, were you aware that multiple states had conducted investigations of Planned Parenthood and found no evidence of wrongdoing?

I was aware that the Human Capital Project had provoked a number of investigations of various entities involved in the fetal procurement industry at both the federal and state level, but I cannot claim to have been aware of the status and results of every one of them. Please see my answer to 7.a for more information.

8. Since 2017, you have represented the Center for Medical Progress (CMP) and David Daleiden in a lawsuit stemming from the defendants' filming and release of unauthorized videos taken at the National Abortion Federation's (NAF) annual conference. NAF sought a temporary restraining order to prohibit CMP and Daleiden from publishing the recordings. A district court judge granted the injunction after the judge determined that the subjects of previous videos released by Daleiden were subjected to death threats and harassment.

In 2019, the district court judge presiding over this case imposed a $200,000 penalty on your law firm, the Thomas More Society, and David Daleiden for publishing the recordings in violation of the temporary restraining order.

Please explain the nature and extent of your involvement in the publication of the recordings in violation of the temporary restraining order.

The premise of this question is false. Thomas More Society attorneys were ***not*** held in contempt; in fact, they were commended by the federal court in the contempt order in question.

The contempt finding related to the conduct of Mr. Daleiden's lead criminal counsel. The district court held Mr. Daleiden and his organization, the Center for Medical Progress, vicariously liable (in our view, erroneously) for the contumacious conduct. The order is not final and has been (and will be) vigorously appealed. I have not played any role in the publication of any video recordings, but I do represent Mr. Daleiden in many matters, including this one.

8. In multiple interviews in 2018, you discussed the sexual assault allegations against Justice Kavanaugh. In one interview, you said "it is very hard to find this allegation credible, especially when it has come to light in such a transparently politically-motivated manner." (Tony Mauro, *Female Clerks Stand by Kavanaugh Despite Assault Allegation,* Nat'l L.J., Sept. 18, 2018). In another interview, you described the sexual assault allegations as "last-minute efforts to block a confirmation vote on [Justice Kavanaugh's] nomination in the Senate." (Sarah Pitlyk & Rebecca Taibleson, *Brett Kavanaugh Is a Man of Rock-Solid Character and Integrity,* www.FoxNews.com, Sept. 14, 2018).

If you are confirmed, what steps will you take to assure survivors of sexual assault that they will receive fair and impartial consideration in your courtroom?

Every litigant in my courtroom will receive fair and impartial consideration, including survivors of sexual assault. First of all, the comments above cast no aspersions on Justice Kavanaugh's accuser. They were directed at the apparent political process surrounding the accusations against Justice Kavanaugh. In the interviews I gave during that time, I made very clear that I could not comment on Justice Kavanaugh's accuser, as I was not in a position to draw any conclusions about her personally. My skepticism of the charges was based on my knowledge of Justice Kavanaugh's character and the fact that these allegations had come to light in a highly unorthodox manner that seemed designed to cause him maximum personal and professional harm.

My role in Justice Kavanaugh's confirmation process was in no way analogous to that of a judge presiding over a case involving sexual assault. In the courtroom, I (and the litigants) would enjoy all of the benefits provided by our legal system: live testimony; questioning by attorneys representing both parties; an evidentiary record consisting of authenticated and relevant evidence from both parties; etc. I also would never preside over a case in which I had substantial extrajudicial knowledge (positive or negative) of the character of one of the parties. There simply is no comparison between my support of Justice Kavanaugh and the role I would play as a district judge.

9. In notes for a 2018 speech, you discussed Justice Kavanaugh's jurisprudence on administrative law. In doing so, you referred to "so-called 'independent agencies'" and characterized such agencies as "threaten[ing] democratic accountability, individual liberty, and government effectiveness." (September 2018, The Federalist Society, Irvine, CA).

a. Which federal regulatory agencies do you believe "threaten[] democratic accountability, individual liberty, and government effectiveness"?

In the quote excerpted here, I was describing concerns articulated by then-Judge Kavanaugh in a speech and several opinions. I did not offer my own opinion on the issues he raised. As a judicial nominee, it would be improper for me to offer my view on any issue that is likely to come before a court. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a

matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

b. Please provide specific examples in which federal regulatory agencies have operated in a manner that "threatens democratic accountability, individual liberty, and government effectiveness."

Please see my response to Question 10.a.

10. In July 2018, you published an article in the National Review where you wrote that Justice Kavanaugh's "record on issues of concern to social conservatives is rock solid." (Sarah Pitlyk *Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism,* Nat'l Review, July 3, 2018).

What are the "issues of concern to social conservatives" that Justice Kavanaugh is "rock solid" on?

This is an excerpt from an op-ed published before then-Judge Kavanaugh was nominated to the Supreme Court, in response to certain specific criticisms that had been leveled at his judicial record from an identifiable political constituency. As his former clerk, I was more familiar than most with that record, and I wanted to support Judge Kavanaugh however I could, so I published an op-ed explaining and defending his opinions in relevant cases. As a judge, of course, I would never be in the position of arguing in support of (or opposition to, for that matter) any nominee to the judiciary, nor of speaking to the concerns of any specific political constituency about a prospective Supreme Court justice or anything else. And it would be improper for me to do so as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges (prohibiting political activity).

11. In notes for a 2019 speech, you described Justice Kavanaugh as "precisely the sort of justice who will recognize the gross defects in the Supreme Court's thoroughly activist abortion jurisprudence, and given the opportunity, will remedy them. It is the kind of the judge who does not deliver politically biased decisions like the ones that we have seen our pro-life clients suffer time and time again." (Law of Life Summit, January 2019, Washington, D.C.)

This misrepresents my brief remarks, which described Justice Kavanaugh as a careful, restrained jurist who makes decisions based solely on the law without regard for political outcomes, and who respects the constraints on his role as a member of the judiciary. The above quotation was an observation about a certain kind of judge; it was not, as represented here, specific to Judge Kavanaugh.

a. What are the "gross defects" in the Supreme Court's abortion jurisprudence? Please explain.

In a 5-minute talk about Justice Kavanaugh to an audience of pro-life activists, I argued that they should not look to the newly-confirmed Justice (or any other judge, for that matter) to deliver policy outcomes they would prefer but rather they should be

hoping for him (and all judges) to make decisions governed strictly by what the law requires, leaving the legislating to the democratically-elected branches. I pointed out that Justice Kavanaugh is just such a judge, so they could not necessarily rely on him for "pro-life" outcomes, but they could rely on him for principled decisions that do not reach beyond the proper role of a judge, which is what everyone who cares about democracy and the rule of law should want.

b. What did you mean when you said Justice Kavanaugh would "remedy" these "gross defects"?

I have not ever said—in this talk or at any other time—that Justice Kavanaugh would "remedy" anything. The whole point of the remarks was that we can count on only one thing from Justice Kavanaugh—that he will decides cases based strictly on the law and not based on any personal or political preference.

c. Please identify the Supreme Court's decisions on abortion rights that you believe are "thoroughly activist."

As a judicial nominee, I am prohibited by the Canons of Judicial Conduct from commenting on any decision of the United States Supreme Court, as they are all equally binding on lower court judges, and—if I am fortunate enough to be confirmed—I will apply them all fully and faithfully.

As for these particular remarks: I was not referring to any specific decision. As noted above, given the brevity and purpose of my remarks, I referred in intentionally general terms to a category of concerns that many members of my audience shared about the Supreme Court's decisions relating to abortion. The purpose of using strong terms in describing those concerns was to stress that, however passionately one feels about the subject, one should still favor restrained, non-political judges.

The family of concerns that I described as "activism" boil down to the concern that the Court's abortion jurisprudence goes beyond the judiciary's appropriate role of interpreting the law and instead engages in the legislative function of setting social policy. This criticism does not presume any particular position on the policy issue itself; it is a critique of judicial methodology, not outcome. Accordingly, versions of this critique have been articulated by policymakers, legal academics, and judges with a wide variety of policy views on abortion.

d. Please identify the Supreme Court's decisions that you believe are "politically biased" against "pro-life" litigants.

My remarks did not indicate that there have been any such Supreme Court decisions, and I remain unaware of any. As advocates for pro-life clients, members of my firm have had occasion to question whether decisions in some of our cases have been colored by bias against pro-life activists. I wasn't referring to any particular instance of that phenomenon and do not think it is consistent with my obligations to my clients to

disclose details of individual cases in this context. Regardless, the remark was not about the Supreme Court.

12. You have argued that surrogacy is harmful to mothers and children.

Please identify all peer-reviewed, scientific evidence that supports your statement that surrogacy is harmful to mothers and children.

On behalf of the American Association of Pro-Life Obstetricians and Gynecologists, the National Association of Catholic Nurses – U.S.A, the Catholic Medical Association, and the American College of Pediatricians, among other groups, I filed a brief arguing that "a woman who undertakes the role of a gestational surrogate assumes a tremendous amount of physical hardship and risk," and that "children born of gestational surrogacy are at higher risk of complications and anomalies than children who are conceived spontaneously." The brief provided primary sources in support of that argument. A copy of the brief is attached hereto.

13. In notes for a 2019 speech, you wrote of the Affordable Care Act: "I know how disappointed social conservatives were by the Supreme Court's unprincipled decision to uphold that law." (Sarah Pitlyk *Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism,* National Review, July 3, 2018).

How was the Supreme Court's decision in *King v. Burwell* "unprincipled"

This quote is from an op-ed, not speech notes, and it is in reference to *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), not *King v. Burwell*. One of the criticisms to which I was responding related to the Supreme Court's decision in *NFIB v. Sebelius*, the outcome of which many commentators have suggested was at least partially determined by political considerations rather than jurisprudential principles.

14. You have expressed a strong personal opposition to a woman's right to make decisions about her reproductive health, including a woman's constitutional right to choose to have an abortion. You have also dedicated your legal career to advancing anti-choice causes.

Out of an 11.5-year legal career, I have worked for the past 2.5 years representing pro-life clients. Prior to that I worked for several years at Covington & Burling LLP in Washington, D.C.; for one year as a judicial clerk on the D.C. Circuit; and almost 4 years at a small civil litigation boutique. In none of those contexts have I ever expressed opposition to "a woman's right to make decisions about her reproductive health."

a. Given your strong personal beliefs and your anti-choice legal work, will you commit to recusing yourself from any case where *Roe v. Wade* is implicated? If not, please indicate under what circumstances your impartiality would not be questioned in a case involving *Roe v. Wade*.

I will apply *Roe v. Wade* and its progeny fully and faithfully, just as I will every decision of the United States Supreme Court and the United States Court of Appeals for

the Eighth Circuit. I know of no reason that anyone should doubt my impartiality in applying that precedent or any other. I fully comprehend the difference between the role of an advocate and the role of a judge, and I take the right of every litigant to an impartial magistrate very seriously.

I will recuse from any case in which my impartiality "might reasonably be questioned," as required by 28 U.S.C. § 455(a), and in any of the circumstances specifically prescribed by 28 U.S.C. § 455(b). In response to any party's concern about my impartiality, I will carefully consult all relevant rules and precedents, and I will confer with both parties, with my chief judge and colleagues, and, if necessary, with ethics specialists at the Administrative Office for the U.S. Courts.

b. Given your legal work opposing Planned Parenthood, will you commit to recusing yourself from any case involving Planned Parenthood? If not, please indicate under what circumstances your impartiality would not be questioned in a case involving Planned Parenthood.

Every case is different, and every suggestion of bias or lack of impartiality has to be considered in the specific factual context in which it arises. It is impossible to assess such a fact-specific matter hypothetically. I will take every suggestion that my impartiality can reasonably be questioned very seriously and will consider it carefully in precisely the manner that I described in response to subsection (a) of this question.

15. Based on your Senate Judiciary Questionnaire, you advocated for the nomination and confirmation of Justice Brett M. Kavanaugh in numerous interviews.

a. How many radio, print, and television interviews regarding the nomination of then-Judge Kavanaugh did you participate in between June 27, 2018 and October 6, 2018? Please provide a specific number.

All interviews in which I participated related to Justice Kavanaugh's confirmation process are set forth in response to Question 12.e of the Senate Judiciary Questionnaire. By my count, I gave 5 radio interviews, 1 print interview, 1 recorded video interview for a website, 1 recorded interview for a local news program, and 4 live television interviews about Judge Kavanaugh during that time. That is 12 interviews in total over approximately 14 weeks.

b. Why did you participate in these interviews?

I gave all of the interviews to express my support for Judge Kavanaugh. I don't enjoy doing media, so I chose to support his nomination primarily through giving talks about his jurisprudence and writing a few op-eds, but I did accept media requests when there was some reason for it to be me (i.e., rather than another Kavanaugh supporter), because it was important to me to support his nomination.

c. Did anyone in the Senate or within the Trump administration advise you that

participating in these interviews regarding the confirmation of Justice Kavanaugh would benefit your own nomination to be a federal judge?

No. I do not recall ever speaking to anyone in the Senate or the Trump administration about any media requests relating to Judge Kavanaugh. Nor do I recall anyone ever mentioning any prospective benefit to me of any kind. I do not think I even received an honorarium for any talk. Everything I ever said or did in relation to Judge Kavanaugh was motivated exclusively by my personal support for him and his nomination.

16. Please identify and describe, by date and method of communication:

a. All communications between you and Senator Hawley regarding your nomination or potential nomination to a federal judgeship.

On March 27, 2019, I spoke to Senator Hawley and two of his staffers over the phone for approximately 25-30 minutes. That is the only communication I have had with him about my then-possible nomination.

I have met twice in person with Senator Blunt, on March 15 and May 17. I also spoke to Senator Blunt on the phone on September 26.

Further information regarding my selection can be found at Question 26 of the Senate Judiciary Questionnaire.

b. All communications between you and Senator Hawley's staff regarding your nomination or potential nomination to a federal judgeship.

I received an email from a member of Senator Hawley's office on January 29, 2019, setting up a phone call two days later, during which that staffer asked if I would consider submitting my name for consideration for the recently-vacated seat on the Eastern District of Missouri. On February 5, 2019, I informed that staffer by email that I was interested in being considered. Since then, I have been in fairly regular email (and occasional phone) communication with the same staffer about developments and/or delays in the processes of being selected, vetted, nominated, and attending my hearing before the Senate Judiciary Committee. Over eight months, we have exchanged too many emails to list individually here.

I have also been in occasional contact by email and phone with members of Senator Blunt's staff, as described in my SJQ.

Further information regarding my selection can be found at Question 26 of the Senate Judiciary Questionnaire.

c. All communications between you and anyone affiliated with Senator Hawley regarding your nomination or potential nomination to a federal judgeship.

All of my communications with Senator Hawley and his staff regarding this nomination are set forth above and in response to Question 26 of the Senate Judiciary Questionnaire.

17. You were a member of the American Bar Association from 2008-2012.

a. Why did you join the American Bar Association?

As I recall, my firm enrolled all associates and paid our dues.

b. Do you believe the American Bar Association's Standing Committee on the Judiciary has a "liberal bias"?

I have no expertise on the basis of which to form any belief about this.

18. Please respond with your views on the proper application of precedent by judges.

a. When, if ever, is it appropriate for lower courts to depart from Supreme Court precedent?

It is never appropriate for lower court judges to depart from controlling Supreme Court precedent.

b. Do you believe it is proper for a district court judge to question Supreme Court precedent in a concurring opinion? What about a dissent?

A district court judge must faithfully apply Supreme Court precedent.

c. When, in your view, is it appropriate for a district court to overturn its own precedent?

A district court decision is not binding. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011). As such, a district court is not bound by another district court's ruling. In addition, Federal Rules of Civil Procedure 59(e) and 60 provide standards for a district court to set aside its prior rulings in a specific case. A district court should revisit or set aside its own decisions when they conflict with the precedent of the Supreme Court or the court of appeals where the district court is located.

d. When, in your view, is it appropriate for the Supreme Court to overturn its own precedent?

Only the Supreme Court may overrule one of its own prior opinions. *Rodriquez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). As a judicial nominee, I do not believe it appropriate to comment on a role unrelated to my nomination

to the federal district court bench. *See* Code of Conduct for United States Judges, Canons 2 and 5. If confirmed, I will faithfully apply all Supreme Court precedent.

19. When Chief Justice Roberts was before the Committee for his nomination, Senator Specter referred to the history and precedent of *Roe v. Wade* as "super-stare decisis." A text book on the law of judicial precedent, co-authored by Justice Neil Gorsuch, refers to *Roe v. Wade* as a "super-precedent" because it has survived more than three dozen attempts to overturn it. (The Law of Judicial Precedent, Thomas West, p. 802 (2016).) The book explains that "superprecedent" is "precedent that defines the law and its requirements so effectively that it prevents divergent holdings in later legal decisions on similar facts or induces disputants to settle their claims without litigation." (The Law of Judicial Precedent, Thomas West, p. 802 (2016))

a. Do you agree that *Roe v. Wade* is "super-stare decisis"? Do you agree it is "superprecedent"?

All Supreme Court precedents are binding on the lower courts. I agree that *Roe v. Wade*, 410 U.S. 113 (1973), as affirmed by *Planned Parenthood v. Casey*, 506 U.S. 833 (1992), binds all lower courts.

b. Is it settled law?

Please see my response to question 20.a.

20. In *Obergefell v. Hodges*, the Supreme Court held that the Constitution guarantees same-sex couples the right to marry. **Is the holding in *Obergefell* settled law?**

Obergefell is binding Supreme Court precedent, and I would apply it fully and faithfully, as I would all Supreme Court and Eighth Circuit precedent.

21. In Justice Stevens's dissent in *District of Columbia v. Heller* he wrote: "The Second Amendment was adopted to protect the right of the people of each of the several States to maintain a well-regulated militia. It was a response to concerns raised during the ratification of the Constitution that the power of Congress to disarm the state militias and create a national standing army posed an intolerable threat to the sovereignty of the several States. Neither the text of the Amendment nor the arguments advanced by its proponents evidenced the slightest interest in limiting any legislature's authority to regulate private civilian uses of firearms."

a. Do you agree with Justice Stevens? Why or why not?

As a judicial nominee, it would not be proper for me to comment on whether I personally agree with particular Supreme Court majority opinions or dissents. I would adhere to *Heller* and all Supreme Court precedent if I were confirmed.

b. Did *Heller* leave room for common-sense gun regulation?

The Supreme Court in *Heller* said that "the right secured by the Second Amendment is not unlimited," that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms," and that there is a "historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008).

c. Did *Heller*, in finding an individual right to bear arms, depart from decades of Supreme Court precedent?

The Supreme Court had not, by the time of *Heller*, developed extensive precedent on the question of whether the Second Amendment protects an individual right. The justices in the majority and in dissent disagreed on the implications of prior precedent. *Compare District of Columbia v. Heller*, 554 U.S. 570, 619-26 (2008), *with id.* at 672-79 (Stevens, J., dissenting).

22. In *Citizens United v. FEC*, the Supreme Court held that corporations have free speech rights under the First Amendment and that any attempt to limit corporations' independent political expenditures is unconstitutional. This decision opened the floodgates to unprecedented sums of dark money in the political process.

a. Do you believe that corporations have First Amendment rights that are equal to individuals' First Amendment rights?

The Supreme Court has held that "First Amendment protection extends to corporations." *Citizens United v. FEC*, 558 U.S. 310, 342 (2010). As a lower-court judge, I would faithfully apply that precedent if I were confirmed.

b. Do individuals have a First Amendment interest in not having their individual speech drowned out by wealthy corporations?

Please see my response to Question 23.a. It would not be proper to opine on an issue that is the subject of pending or impending litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

c. Do you believe corporations also have a right to freedom of religion under the First Amendment?

The Supreme Court has said that nonprofit corporations and for-profit closely held corporations have protection under the Religious Freedom Restoration Act. *Burwell v. Hobby Lobby Stores*, 573 U.S. 682, 719 (2014). I would faithfully apply that precedent if I were to be confirmed.

23. You indicated on your Senate Questionnaire that you have been a member of the Federalist Society since 2006. The Federalist Society's "About Us" webpage explains the purpose of the organization as follows: "Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law." It says that the Federalist Society seeks to "reorder[] priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, law students and professors. In working to achieve these goals, the Society has created a conservative and libertarian intellectual network that extends to all levels of the legal community."

a. Could you please elaborate on the "form of orthodox liberal ideology which advocates a centralized and uniform society" that the Federalist Society claims dominates law schools?

I was not involved in the drafting of that statement and I do not presume to speak for the Federalist Society.

b. How exactly does the Federalist Society seek to "reorder priorities within the legal system"?

Please see my response to Question 24.a.

c. What "traditional values" does the Federalist society seek to place a premium on?

Please see my response to Question 24.a.

d. Have you had any contact with anyone at the Federalist Society about your possible nomination to any federal court?

A friend-of-a-friend who works at the Federalist Society was part of an early conversation about the possibility that I might be nominated. That was a conversation among personal acquaintances before I even knew if the Missouri Senators would include my name on the list of candidates for consideration by the White House Counsel's Office. The conversation did not include any government employees or officials. And I have not had any contact with the Federalist Society employee since.

24. On February 22, 2018, when speaking to the Conservative Political Action Conference (CPAC), former White House Counsel Don McGahn told the audience about the Administration's interview process for judicial nominees. He said: "On the judicial piece … one of the things we interview on is their views on administrative law. And what you're seeing is the President nominating a number of people who have some experience, if not expertise, in dealing

with the government, particularly the regulatory apparatus. This is different than judicial selection in past years…"

a. Did anyone in this Administration, including at the White House or the Department of Justice, ever ask you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

No.

b. Since 2016, has anyone with or affiliated with the Federalist Society, the Heritage Foundation, or any other group, asked you about your views on any issue related to administrative law, including your "views on administrative law"? If so, by whom, what was asked, and what was your response?

No.

c. What are your "views on administrative law"?

That is a very broad question, which I'm not sure how to answer. I am familiar with how administrative agencies function and the role that they play from working as a regulatory attorney at Covington & Burling and then clerking on the D.C. Circuit. I am also familiar with controversies relating to judicial review of agency structure and decision-making, but I would not say that I have a general "view" or "views" about "administrative law." I would follow Supreme Court and Eighth Circuit precedent on issues of administrative law fully and faithfully.

25. Do you believe that human activity is contributing to or causing climate change?

I am aware of research indicating that human activity is contributing to or causing climate change. It would be improper for me as a nominee to comment on an issue that is subject to litigation and political debate. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 5 ("A judge should refrain from political activity"); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

26. When is it appropriate for judges to consider legislative history in construing a statute?

The Supreme Court has said that it is appropriate to consider legislative history when the statutory text is ambiguous. *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017).

27. At any point during the process that led to your nomination, did you have any discussions with anyone — including, but not limited to, individuals at the White House, at the Justice Department, or any outside groups — about loyalty to President Trump? If so, please elaborate.

No.

28. Please describe with particularity the process by which you answered these questions.

I drafted answers to these questions, solicited comments the Office of Legal Policy at the Department of Justice, and revised my draft answers as I decided was appropriate. These answers are my own.

2018 WL 2558407 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Melissa Kay COOK, Individually and Melissa Kay Cook, as
Guardian Ad Litem of Baby A, Baby B and Baby C, Petitioners,
v.
Cynthia Ann HARDING, M.P.H.; et al., Respondents.

No. 17-1487.
May 30, 2018.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Motion and Brief of American Association of Pro-Life Obstetricians & Gynecologists, Charlotte Lozier Institute, National Catholic Bioethics Center, National Association Of Catholic Nurses - U.S.A., Catholic Medical Association, Concerned Women for America, Center for Family & Human Rights, and American College of Pediatricians as Amici Curiae in Support of Petitioners

Thomas Brejcha, Sarah E. Pitlyk, Thomas More Society, 19 South LaSalle Street, Suite 603, Chicago, Illinois 60603, (312) 782-1680, tbrejcha @thomasmoresociety.org, for amici curiae, American, Association of Pro-Life Obstetricians &, Gynecologists, Charlotte Lozier Institute, National, Catholic Bioethics Center, National, Association of Catholic Nurses - U.SA., Catholic, Medical Association, Concerned Women for, America, Center for Family & Human Rights, and American College of Pediatricians.

*1 MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Petitioner Melissa Cook and Respondents Edmund G. Brown, Jr., Governor of the State of California and Karen Smith, M.D., M.P.H., have consented to the filing of this amicus curiae brief by American Association of Pro-Life Obstetricians & Gynecologists ("AAPLOG"), the Charlotte Lozier Institute ("CLI"), the National Catholic Bioethics Center ("NCBC"), the National Association of Catholic Nurses - U.S.A. ("NACN-USA"), the Catholic Medical Association ("CMA"), Concerned Women for America ("CWA"), the Center for Family & Human Rights ("C-Fam"), and the American College of Pediatricians ("ACPeds"). Respondents Cynthia Ann Harding, M.P.H., Jeffrey D. Gunzenhauser, M.D., M.P.H., Dean C. Logan; CM.; Kaiser Foundation Hospital, Panorama City Medical Center, and Payman Rashan have withheld their consent. Therefore, pursuant to Supreme Court Rule 37.2(b), AAPLOG, CLI, NCBC, NACN-USA, CMA, CWA, C-Fam, and ACPeds move for leave to file this amicus curiae brief in support of Petitioner in the above-captioned matter for the following reasons:

Amicus curiae American Association of Pro-Life Obstetricians & Gynecologists is a non-profit professional medical organization consisting of approximately 4,600 members, of which at least 3,000 are Obstetricians-Gynecologists practicing medicine in the United States and several foreign countries. AAP-LOG's mission is to encourage the practice of medicine consistently with scientific truth and the Hippocratic *2 Oath, both of which it views as orienting medicine, as a healing art, toward the well-being and flourishing of all human life. Its mission includes informing courts, legislatures and the general public of scientific developments and their impact on the ethical practice of medicine.

Amicus curiae Charlotte Lozier Institute is the education and research arm of the Susan B. Anthony List. Named after a 19th century feminist physician who, like Susan B. Anthony, championed women's rights without sacrificing either equal opportunity or the lives of the unborn, the Lozier Institute studies federal and state policies and their impact on women's health and on child and family well-being.

Amicus curiae National Catholic Bioethics Center is a non-profit research and educational institute committed to applying the principles of natural moral law, consistent with many traditions including the teachings of the Catholic Church, to ethical issues arising in healthcare and the life sciences. NCBC is committed to fostering a culture of respect for human life and human dignity, particularly in the medical context.

Amicus curiae National Association of Catholic Nurses - U.S.A. is the national professional organization for Catholic nurses in the United States. A non-profit group of hundreds of nurses of different backgrounds, the NACN-USA focuses on promoting moral principles of patient advocacy, human dignity, and professional and spiritual development in the integration of faith and health within the Catholic context in nursing.

*3 Amicus curiae Catholic Medical Association is a national, physician-led community of healthcare professionals that informs, organizes, and inspires its members in steadfast fidelity to the teachings of the Catholic Church, to uphold the principles of the Catholic faith in the science and practice of medicine. CMA has a membership of approximately 2,200 healthcare professionals throughout the United States.

Amicus curiae Concerned Women for America is the nation's largest public policy women's organization with a rich history of over three decades of helping members across the country bring Biblical principles into all levels of public policy. Among the seven core values underlying CWA's mission are the protection of all innocent human life from conception until natural death and defense of the family. Both of those issues are implicated by the practice of gestational surrogacy.

Amicus curiae Center for Family & Human Rights was founded in 1997 with a mission to defend life and family at international institutions and to publicize the debate. C-Fam is a non-partisan, non-profit research institute dedicated to, among other things, reestablishing a proper understanding of the dignity of the human person. This case implicates the dignity of the most vulnerable humans, unborn children.

Amicus curiae American College of Pediatricians is a national organization of pediatricians and other healthcare professionals dedicated to the health and well-being of children. The ACPeds Board of Directors has conducted research on surrogacy and is gravely *4 concerned about its effects on gestational mothers and children.

As part of their advocacy efforts, all amici file amicus briefs relating to medical practices that implicate the dignity of the human person, such as abortion, embryo-destructive research, and surrogacy. Surrogacy raises an array of troubling issues that all amici consider to be of paramount public concern and within their organizational missions. There is a voluminous and ever-growing body of medical research showing that surrogacy poses serious medical risks to both the pregnant women and the children they carry. In addition, the practice of surrogacy has grave effects on society, such as diminished respect for motherhood and the unique mother-child bond; exploitation of women; commodification of gestation and of children themselves; and weakening of appropriate social mores against eugenic abortion. Any medical practice that exploits and commodities vulnerable members of the human family is of concern to amici and their members, who share the goal of ensuring that the medical profession promotes human dignity and adheres to its foundational commitment to "do no harm."

Amici submit that their amicus curiae brief will aid the Court in understanding the physical effects of gestational surrogacy on surrogates and their children. The information provided herein will help the Court to better understand and evaluate the parties' claims about the effects of California's gestational surrogacy statute on fundamental rights and familial relationships, which are crucial to resolution of this case.

*5 THEREFORE, amici curiae, AAPLOG, CLI, NCBC, NACN-USA, CMA, CWA, C-Fam, and ACPeds respectfully request that this Court accept the attached amicus curiae brief in support of the Petitioners.

*i TABLE OF CONTENTS

*ii TABLE OF AUTHORITIES

Statutes

Other Authorities

*1 INTEREST OF AMICI CURIAE [1]

1 Petitioner Melissa Cook and Respondents Edmund G. Brown, Jr., Governor of the State of California and Karen Smith, M.D., M.P.H., have consented to the filing of this brief by and through their counsel. Respondents Cynthia Ann Harding, M.P.H., Jeffrey D. Gunzenhauser, M.D., M.P.H., Dean C. Logan; CM.; Kaiser Foundation Hospital, Panorama City Medical Center, and Payman Rashan have withheld their consent. Further, as required by Supreme Court Rule 37.6, counsel certifies this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by

any person or entity other than amici curiae, their members, or their counsel. The parties were notified ten days prior to the due date of this brief of the intention to file.

Amicus curiae American Association of Pro-Life Obstetricians & Gynecologists ("AAPLOG") is a nonprofit professional medical organization consisting of approximately 4,600 members, of which at least 3,000 are Obstetricians-Gynecologists practicing medicine in the United States and several foreign countries. AAPLOG's mission is to encourage the practice of medicine consistently with scientific truth and the Hippocratic Oath, both of which it views as orienting medicine, as a healing art, toward the well-being and flourishing of all human life. Its mission includes informing courts, legislatures and the general public of scientific developments and their impact on the ethical practice of medicine.

Amicus curiae Charlotte Lozier Institute ("CLI") is the education and research arm of the Susan B. Anthony List. Named after a 19th century feminist physician who, like Susan B. Anthony, championed women's rights without sacrificing either equal opportunity or the lives of ***2** the unborn, the Lozier Institute studies federal and state policies and their impact on women's health and on child and family well-being.

Amicus curiae National Catholic Bioethics Center ("NCBC") is a non-profit research and educational institute committed to applying the principles of natural moral law, consistent with many traditions including the teachings of the Catholic Church, to ethical issues arising in healthcare and the life sciences. NCBC is committed to fostering a culture of respect for human life and human dignity, particularly in the medical context.

Amicus curiae National Association of Catholic Nurses - U.S.A. ("NACN-USA") is the national professional organization for Catholic nurses in the United States. A non-profit group of hundreds of nurses of different backgrounds, the NACN-USA focuses on promoting moral principles of patient advocacy, human dignity, and professional and spiritual development in the integration of faith and health within the Catholic context in nursing.

Amicus curiae Catholic Medical Association ("CMA") is a national, physician-led community of healthcare professionals that informs, organizes, and inspires its members in steadfast fidelity to the teachings of the Catholic Church, to uphold the principles of the Catholic faith in the science and practice of medicine. CMA has a membership of approximately 2,200 healthcare professionals throughout the United States.

***3** Amicus curiae Concerned Women for America ("CWA") is the nation's largest public policy women's organization with a rich history of over three decades of helping members across the country bring Biblical principles into all levels of public policy. Among the seven core values underlying CWA's mission are the protection of all innocent human life from conception until natural death and defense of the family. Both of those issues are implicated by the practice of gestational surrogacy.

Amicus curiae Center for Family & Human Rights ("C-Fam") was founded in 1997 with a mission to defend life and family at international institutions and to publicize the debate. C-Fam is a non-partisan, nonprofit research institute dedicated to, among other things, reestablishing a proper understanding of the dignity of the human person. This case implicates the dignity of the most vulnerable humans, unborn children.

Amicus curiae American College of Pediatricians ("ACPeds") is a national organization of pediatricians and other healthcare professionals dedicated to the health and well-being of children. The ACPeds Board of Directors has conducted research on surrogacy and is gravely concerned about its effects on gestational mothers and children.

Surrogacy raises an array of troubling issues that all amici consider to be of paramount public concern and within their organizational missions. There is a voluminous and ever-growing body of medical research ***4** showing that surrogacy poses serious medical risks to both surrogates and the children they carry. In addition, the practice of surrogacy has grave effects on society, such as diminished respect for motherhood and the unique mother-child bond; exploitation of women; commodification of gestation and of children themselves; and weakening of appropriate social mores against eugenic abortion. Any medical

practice that exploits and commodifies vulnerable members of the human family is of concern to amici and their members, who share the goal of ensuring that the medical profession promotes human dignity and adheres to its foundational commitment to "do no harm."

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici AAPLOG, CLI, NCBC, NACN-USA, CMA, CWA, C-Fam, and ACPeds submit this amicus curiae brief to elaborate on the medical burdens and risks associated with gestational surrogacy, in order to help the Court better appreciate the consequences of laws, such as California Family Code § 7962, that enable and enforce the practice of surrogacy.

Gestational surrogacy involves tremendous physical stress and medical risk for both the surrogate and her children, both before and after birth. Gestational surrogacy requires *in vitro* fertilization ("IVF"), which poses substantially greater burdens and risks to the mother than spontaneous conception. Babies born of ***5** surrogacy are also at substantially increased risk of many serious diseases and disorders. The practice of "gestational surrogacy" harms women and children.

ARGUMENT

I. Surrogacy harms surrogate birthmothers.

Every pregnancy involves significant physical stress for the pregnant woman. *See* P. Soma-Pillay et al., *Physiological Changes in Pregnancy,* 27 Cardiovasc. J. Afr. 89, 89 (2016) (enumerating the "significant anatomical and physiological changes" associated with pregnancy). Because they are initiated by IVF, gestational surrogate pregnancies involve even greater physical risks and burdens than pregnancies conceived spontaneously, and without any of the prospective benefits associated with lifelong parenthood. Surrogacy's burdens on birthmothers far outweigh any benefit to them.

A prospective gestational surrogate has to endure an onerous hormone regimen before she even becomes pregnant, in order to prepare her body to receive the embryo(s) she will carry. *See* Center for Bioethics & Culture Network, *Drugs Commonly Used for Women in Gestational Surrogacy Pregnancies,* http://breeders.cbcnetwork.org/wp-content/uploads/2013/12/Drugs-Commonly-Used-for-Women-in-Gestational-Surrogacy-Pregnancies.pdf (last visited May 21, 2018). That drug regimen typically includes a synthetic hormone, e.g., Lupron, to inhibit her menstrual cycle and place her into "medical ***6** menopause," followed by oral estrogen to "artificially thicken the lining of the endometrium," followed by progesterone to further enhance the uterine lining and improve the likelihood of successful implantation. *Id.* If the intended effects of the drug regimen were not difficult enough to tolerate, the prospective surrogate also assumes the risk of a whole range of undesirable side effects, including "hot flashes, headache, mood swings and depression, general body aches, nausea, joint pain, edema, nervousness, weight gain, dizziness, tingling in extremities, [and] loss in bone density." *Id.; see also* K. Momberger, *Breeder at Law,* 11 Colum. J. Gender & L. 127, 159 (2002) ("Because it shuts down your system to a certain extent, Lupron causes you to have menopause-like side effects.... Lupron also caused me severe migraine headaches and constant fatigue...."); J. Radecki, *Note: The Scramble to Promote Egg Donation Through a More Protective Regulatory Regime,* 90 Chi.-Kent L. Rev. 729, 746-48 (2015) (noting that Lupron is not FDA-approved for use in assisted reproduction and that its side effects for those purposes have therefore not been adequately evaluated).

If one or more embryos successfully implant in the gestational surrogate's uterus, the pregnant surogate mother is then at higher risk of many serious complications and adverse outcomes than pregnant mothers who conceived spontaneously. A recent meta-analysis of 50 cohort studies comprising 161,370 singleton pregnancies conceived by assisted reproductive technologies ("ART") such as IVF and 2,280,241 ***7** spontaneously-conceived singleton pregnancies found that women who conceive singleton pregnancies by ART are at elevated risk of many grave complications - e.g., pregnancy-induced hypertension, gestational diabetes, placenta previa, placental abruption, antepartum hemorrhage, postpartum hemorrhage, polyhydramnios, oligohydramnios, and cesarean section - relative to women who conceive singletons spontaneously. *See* J. Qin et al., *Assisted Reproductive Technology and the Risk of Pregnancy-Related Complications and Adverse Pregnancy Outcomes in Singleton*

Pregnancies: A Meta-Analysis of Cohort Studies, 105 Fertility & Sterility 73, 76 (2016) ("Qin I"); *see also* P. Henriksson et al., *Incidence of Pulmonary and Venous Thromboembolism in Pregnancies After In Vitro Fertilization: Cross Sectional Study,* 346 BMJ e8632 (2013), *available at* http://www.bmj.com/content/346/bmj.e8632 (last visited May 21, 2018) ("Pregnant women are at higher risk of venous thromboembolism after *in vitro* fertilisation, particularly during the first trimester. The risk of pulmonary embolism in women after *in vitro* fertilisation was increased almost sevenfold during the first trimester....").

IVF also yields a higher number of multifetal pregnancies than spontaneous conception. Multiple pregnancies pose substantially higher risks of medical complications than singleton pregnancies. *See* Am. C. Obstetricians & Gynecologists ("ACOG"), *Practice Bulletin No. 169: Multi Fetal Gestations: Twin, Triplet, and Higher-Order Multi Fetal Pregnancies,* 128 Obstetrics & Gynecology 926 (2016). Pregnant mothers of ***8** multiples are at higher risk than women bearing singletons of "hyperemesis, gestational diabetes mellitus, hypertension, anemia, hemorrhage, cesarean delivery, and postpartum depression," as well as hypertensive complications, such as preeclampsia. *Id.* at 927; *see also A.* Lynch et al., *Preeclampsia in Multiple Gestation: The Role of Assisted Reproductive Technologies,* 99 Obstetrics & Gynecology 445 (2002) (finding an increased risk of preeclampsia in pregnancies conceived by ART). Moreover, mothers of multiples conceived by ART are at higher risk of certain complications *even than other mothers of multiples,* including premature rupture of membranes, pregnancy-induced hypertension, gestational diabetes, preterm birth, very preterm birth, low birthweight, very low birthweight, and congenital malformations. *See* J. Qin et al., *Pregnancy-Related Complications and Adverse Pregnancy Outcomes in Multiple Pregnancies Resulting from Assisted Reproductive Technology: A Meta-Analysis of Cohort Studies,* 103 Fertility & Sterility 1492, 1505 (2016) ("Qin II").

In sum, a woman who undertakes the role of a gestational surrogate assumes a tremendous amount of physical hardship and risk. *See* Am. Soc'y Reprod. Med. Ethics Comm., *Consideration of the Gestational Carrier: A Committee Opinion,* 99 Fertility & Sterility 1838 (2013), *available at* http://www.fertstert.org/article/S0015-0282(13)00341-5/pdf (acknowledging the wide range of medical, legal, and ethical issues associated with "gestational surrogacy," including the risk of "undue inducements for women to expose themselves to ***9** the physical and emotional risks") (last visited May 21, 2018).

II. Infants conceived by surrogacy are at higher risk of adverse outcomes and anomalies than infants conceived spontaneously.

Having been conceived by IVF, children born of gestational surrogacy are at higher risk of complications and anomalies than children who are conceived spontaneously. See S. Ensing et al., *Risk of Poor NeoNatal Outcome at Term After Medically Assisted Reroduction: A Propensity Score-Matched Study,* 104 Fertility & Sterility 384, 388 (2015) (finding higher rates of "asphyxia-related poor neonatal outcomes" and cesarean deliveries in pregnancies conceived by artificial reproductive technology than in spontaneously-conceived pregnancies); J. Liu et al., *Neonatal and Obstetric Outcomes of* In Vitro *Fertilization (IVF) and Natural Conception at a Chinese Reproductive Unit,* 42 Clin. & Exp. Obstetrics & Gynecol. 452, 455 (2015) (finding that IVF is associated with "an increased risk of preterm delivery, caesarean delivery, low and very low birth weight infants"). Some of those complications can be attributed to the clinical practice of transferring multiple embryos, but infants conceived by IVF are also at higher risk of structural defects, genetic disorders, and anomalies unrelated to multifetal gestation.

***10** A. Multiple embryo transfers increase the risks to infants conceived by IVF.

The common practice of transferring multiple embryos in the context of IVF creates a very high incidence of multifetal gestations. *See* M. Reynolds et al., *Risk of Multiple Birth Associated with* In Vitro *Fertilization Using Donor Eggs,* 154 Am. J. Epidemiology 1043, 1043 (2001) (attributing a substantial increase in the rate of twin birth to the practice of transferring multiple embryos in the context of IVF). The incidence of multifetal gestation is even higher in IVF involving donor eggs - such as in the context of gestational surrogacy - than in IVF using a woman's own eggs. *Id.* at 1047 (finding the rate of multiple births in the context of IVF with a donor egg to exceed 40 percent - "significantly higher than that previously reported for IVF patients of the same age who used their own eggs").

Multifetal pregnancies pose far greater risks to infants than singleton pregnancies - both before and after birth. *See* E. Kamphuis et al., *Are We Overusing IVF?,* 348 BMJ g252 (2014) ("Multiple pregnancies are associated with maternal and perinatal complications such as gestational diabetes, fetal growth restriction, and pre-eclampsia as well as premature birth."). According to the American College of Obstetricians & Gynecologists, multifetal gestations have "an approximate fivefold increased risk of still-birth and a sevenfold increased risk of neonatal death, which primarily is due to complications of prematurity." *See* ACOG, *supra,* at 926.

***11** Additionally, children born after a multifetal gestation have higher rates of morbidity as newborns or infants. Prematurity is not only the "leading cause of infant mortality worldwide"; it is also associated with respiratory complications, infection, neurologic damage, cognitive impairment and a wide range of other complications. R. Patel et al., *Short- and Long-term Outcomes for Extremely Preterm Infants,* 33 Am. J. Perinatology 318 (2016). "Twins born preterm (less than 32 weeks of gestation) are at twice the risk of a high-grade intraventricular hemorrhage and periventricular leukomalacia when compared with singletons of the same gestational age." ACOG, *supra,* at 926. Intraventricular hemorrhage and periventricular leukomalacia, in turn, are associated with cerebral palsy, as well as developmental delays and learning difficulties. *See* L. Linsell et al., *Prognostic Factors for Cerebral Palsy and Motor Impairment in Children Born Very Preterm or Very Low Birthweight: A Systematic Review,* 58 Developmental Med. & Child Neurology 554 (2016); T. Luu, *Lasting Effects of Preterm Birth and Neonatal Hemorrhage at 12 Years of Age,* 123 Pediatrics 1037 (2009).

In some cases of multifetal gestation, a mother will elect to abort one or more of the fetuses, either because the prospective parents are not prepared to parent all of the babies or because they hope to enhance the other babies' prospects of survival. *See* A. Mohammed et al., *Obstetric and Neonatal Outcome of Multifetal Pregnancy Reduction,* 20 Middle East Fertility Soc'y J. 176, 177 (2015) (discussing typical rationales ***12** for "fetal reduction"). But research has shown that elective reduction of multifetal gestations can actually increase the risk of miscarriage or prematurity of the remaining children. *See A.* Antsaklis et al., *Pregnancy Outcome After Multifetal Pregnancy Reduction,* 16 J. Maternal-Fetal & Neonatal Med. 1807, 1812 (2015) (finding that reduction from twins to a singleton significantly increases the chances of preterm birth or miscarriage of the surviving twin); A.T. Papageoghiou et al., *Risk of Miscarriage and Early Pre-Term Birth in Trichorionic Triplet Pregnancies with Embryo Reduction Versus Expectant Management: New Data and Systematic Review,* 21 Human Reproduction 1912, 1916 (2006) (finding that elective reduction from triplets to twins is associated with an increase in the risk of subsequent miscarriage).

B. Children conceived by IVF have higher rates of birth defects, genetic disorders, and other anomalies.

Like their gestational mothers, children conceived by IVF have higher rates of adverse outcomes and complications. For example, research has shown that singletons conceived by IVF are at "significantly increased risk" of preterm birth and low birthweight - "the two most important determinants of neonatal morbidity and mortality" - compared with spontaneously-conceived singletons. S. McDonald et al., *Preterm Birth and Low Birth Weight Among* In Vitro *Singletons: A Systematic Review and Meta-Analyses,* 146 Eur. J. Obstetrics, Gynecology, & Reprod. Biology ***13** 138, 145 (2009) (concluding that, compared with spontaneously-conceived singleton neonates, singletons conceived via *in vitro* fertilization are at higher risk of preterm birth, very low birthweight, and intrauterine growth retardation); *see also* S. Sunderam et al., *Assisted Reproductive Technology Surveillance - United States, 2013,* 64 Morbidity & Mortality Weekly Report: Surveillance Summaries, Dec. 4, 2015, at 10 ("In 2013, singleton infants conceived with ART (9.0%) were more likely than infants born in the total birth population (6.3%) to have low birthweight."); Kamphuis, *supra,* at g252 ("[E]ven singletons born through IVF have been shown to have worse outcomes than those conceived naturally."); Qin I, *supra,* at 76-81 (finding "ART singleton pregnancies" at "significantly increased risk" of preterm birth, low birthweight, and perinatal mortality, among other adverse outcomes).

There is also a higher incidence of congenital structural defects in children conceived by IVF than in children conceived spontaneously. A 2013 meta-analysis of 45 studies found "a statistically significant increased risk of birth defects in infants conceived using assisted reproductive technologies of the order of 30-40%." M. Hansen et al., *Assisted Reproductive Technology and Birth Defects: A Systematic Review and Meta-Analysis,* 19 Hum. Reprod. Update 330, 335 (2013). *See* M. Farhangniya et al., *Comparison of Congenital Abnormalities of Infants Conceived by Assisted Reproductive Techniques versus Infants with Natural*

Conception in Tehran, 7 Int'l J. Fertility & Sterility 217, 217 (2013) (reporting that infants conceived via IVF are at greater ***14** risk of "major congenital malformations," especially musculoskeletal and urogenital malformations, than infants conceived naturally); J. Wen et al., *Birth Defects in Children Conceived by* In Vitro *Fertilization and Intracytoplasmic Sperm Injection: A Meta-Analysis,* 97 Fertility & Sterility 1331, 1332 (2012) (finding, based on a meta-analysis of 56 studies, that children conceived by ART are at significantly increased risk for birth defects); J. Reefhuis et al., *Assisted Reproductive Technology and Major Structural Birth Defects in the United States,* 24 Hum. Reprod. 360, 363 (2009) (finding that infants conceived by ART are at higher risk of septal heart defects, cleft lip with or without cleft palate, esophageal atresia, and anorectal atresia); D. El-Chaar et al., *Risk of Birth Defects Increased in Pregnancies Conceived by Assisted Human Reproduction,* 92 Fertility & Sterility 1557, 1559 (2009) ("Compared with infants conceived naturally, a significantly greater proportion of those conceived with AHR had gastrointestinal, cardiovascular, and musculoskeletal defects."); *see also* R. Klemetti et al., *Increasing Evidence of Major Congenital Anomalies in Children Born with Assisted Reproduction Technology: What Should Be Done?,* 84 Fertility & Sterility 1327 (2005) (arguing that prospective parents should be informed of the evidence of potential risks of birth defects and also that further research into congenital anomalies is needed).

Children conceived by IVF are up to ten times more likely than the general population to suffer from certain serious genetic disorders, such as Beckwith-Wiedemann Syndrome ("BWS") and Angelman Syndrome. ***15** *See* T. Blackwell, In Vitro *Fertilization Linked to Rare Genetic Disorders,* Nat'l Post, Sep. 25, 2011, http://nationalpost.com/news/in-vitro-fertilization-linked-to-rare-genetic-disorders (last visited XX/XX/2018) (describing findings that babies born after IVF are "up to 10 times more likely to suffer from" BWS and Angelman Syndrome and quoting a geneticist's opinion that "that is likely just the tip of the iceberg"); J. Halliday et al., *Beckwith-Wiedemann Syndrome and IVF: A Case-Control Study,* 75 Am. J. Hum. Genetics 526, 528 (2004) (finding that children conceived by RTF are nine times more likely to have Beckwith-Wiedemann Syndrome than the general population).

Children conceived *in vitro* are at elevated risk of many other diseases and disorders as well. *See, e.g.,* S. Katari et al., *DNA Methylation and Gene Expression Differences in Children Conceived* In Vitro *or* In Vivo, 18 Human Molecular Genetics 3769, 3776 (2009) ("[W]e have shown that *in vitro* conception is associated with quantitative differences in DNA methylation and that some of these differences may have a significant effect on gene expression."); A. Moll et al., *Incidence of Retinoblastoma in Children Born After in-Vitro Fertilization,* 361 Lancet 309 (2003) (finding that children conceived by IVF are at increased risk for retinoblastoma, a cancer of the eye that occurs in childhood); Kamphuis, *supra,* at g252 ("Otherwise healthy children conceived by IVF may have higher blood pressure, adiposity, glucose levels, and more generalised vascular dysfunction than children conceived naturally").

***16** Thus, gestational surrogacy imposes substantial physical hardship and risk on the child, as well as its mother.

CONCLUSION

For the foregoing reasons, amici urge the Court to grant the petition for writ of certiorari.

Respectfully submitted,

Thomas Brejcha

Counsel of Record

Sarah E. Pitlyk

Thomas More Society

19 South LaSalle Street, Suite 603

Chicago, Illinois 60603

(312) 782-1680

tbrejcha@thomasmoresociety.org

Counsel for Amici Curiae, American Association of Pro-Life Obstetricians & Gynecologists, Charlotte Lozier Institute, National Catholic Bioethics Center, National Association of Catholic Nurses - U.S.A., Catholic Medical Association, Concerned Women for America, Center for Family & Human Rights, and American College of Pediatricians

May 30, 2018

End of Document

2018 WL 6042850 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Kristina BOX, Commissioner of the Indiana State Department of Health, et al., Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., et al., Respondents.

No. 18-483.
November 15, 2018.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Brief of the Restoration Project; Pastor Joseph Parker, Pastor of Greater Turner Chapel A.M.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society as Amici Curiae in Support of Petitioners

Thomas L. Brejcha, Sarah E. Pitlyk, Stephen M. Crampton, Thomas More Society, 309 W. Washington Street, Suite 1250, Chicago, Illinois 60606, (312) 782-1680, tbrejcha@thomasmoresociety.org, for amici curiae The Restoration Project; Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society.

*i TABLE OF CONTENTS

*iii TABLE OF AUTHORITIES

Statutes

*1 INTEREST OF THE AMICI CURIAE [1]

[1] Counsel for Petitioners and Respondents received timely notice of amici curiae's intent to file this brief and counsel for Petitioners and Respondents have consented to its filing. Further, as required by Supreme Court Rule 37.6, counsel certifies this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than amici curiae, their members, or their counsel.

The Restoration Project ("TRP") is a non-profit organization dedicated to rebuilding families, promoting the sanctity of life, and providing related educational materials, in order to transform American public policy and culture's impact on Black life. TRP works with pastors, ministry leaders and organizations to restore a culture of uprightness, evenhandedness, and virtue.

Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church in Greenwood, MS, has served as a pastor of different congregations for a little more than 40 years. He has been working to stand up for life against abortion for more than 20 years and is disturbed by the abortion industry's deliberate targeting of the African American community.

Everlasting Light Ministries is a comprehensive post-abortion healing and marriage ministry that seeks to heal the massive devastation of abortion and marital discord in America and especially in communities of color; proclaim the truth about abortion and its real life consequences; and sensitize communities to the needs of all post-abortive, post-miscarriage people.

***2 Protect Life and Marriage** Texas works to uphold the Judeo-Christian ethic established by our Founding Fathers in our society with the view of securing liberty for marriages, the American family and the life of the unborn.

The Thomas More Society ("TMS") is a national public interest law firm devoted to restoring respect in the law for life, the family and religious liberty. Based in Chicago, TMS accomplishes its organizational mission through litigation, education, and related activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici The Restoration Project, Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church, Everlasting Light Ministries, Protect Life and Marriage Texas, and the Thomas More Society submit this brief to aid the Court in assessing the gravity of the problem Indiana's HEA 1337 and similar state statutes seek to address. Invidious discrimination in the provision of abortion services is an entrenched and escalating phenomenon. Babies of minority mothers are aborted at a far higher rate than their white counterparts - a disturbing trend that the abortion industry intentionally and unabashedly perpetuates. With recent advances in prenatal testing technology, abortions motivated by the unborn child's gender, disability, and *3 other disfavored genetic traits are also dramatically on the rise.

HEA 1337 and similar state laws are sensible and important legislative responses to racist, sexist, and eugenic practices performed under the guise of "reproductive rights." This Court should grant certiorari in order to reverse the Seventh Circuit and reinstate HEA 1337.

ARGUMENT

I. The Delivery of Abortion Services is Infected with Racial Bias.

A. The origins of abortion are racist and eugenic.

The eugenic origins of the birth-control movement - the progenitor of the abortion rights movement - are well-established. See, *e.g.*, Rebecca A. Messall, *Margaret Sanger and the Eugenics Movement,* Human Life Rev., Spring 2010, at 98 (noting that the founders and early leaders of what became Planned Parenthood were all members of the American Eugenics Society). Margaret Sanger, the founder of the birth control organization that became Planned Parenthood, wrote:

> [T]he example of the inferior classes, the fertility of the feeble-minded, the mentally defective, the poverty-stricken classes, should not be held up for emulation to the mentally and physically fit though less fertile parents of the educated and well-to-do classes. On the *4 contrary, **the most urgent problem today is how to limit and discourage the over-fertility of the mentally and physically defective.**

Margaret Sanger, *The Eugenic Value of Birth Control Propaganda,* Birth Control Rev., XX/XX/1921, at 5, available at https://www.nyu.edu/projects/sanger/web edition/app/documents/show.php?sangerDoc=238946.xml.

Scholars of the history of the eugenics movement acknowledge that Sanger "supported some eugenic aims, and was not above voicing her contempt for the poor, disabled and minorities." Paul A. Lombardo, *Symposium Article: Disability, Eugenics, and the Culture Wars,* 2 St. Louis U. J. Health L. & Pol'y 57, 76 (2008). They also acknowledge that in Planned Parenthood's early advocacy for birth control, "[t]he organization focused on unwanted children and pathological parenting in poor African American communities. ..." Mary Ziegler, 25 Yale J.L. & Feminism 1, 13 (2013); *see also Birth Control or Race Control? Sanger and the Negro Project,* Newsletter #28 (The Margaret Sanger Papers Project, New York University, New York, NY), Fall 2001 (conceding that "the patriarchal racism of the time ... dictated both the Federation's and Sanger's approach to blacks and birth control"), https://www.nyu.edu/projects/sanger/articles/bc_or_race_control.php. To early advocates of birth control and abortion, minority racial groups were among "the mentally and physically defective" whose fertility they sought to limit.

*5 B. The modern abortion industry continues to target ethnic minorities.

Modern advocates of abortion disavow the racism of Planned Parenthood's founders. *See, e.g.,* Now This News, Group Nine Media, Inc., Video: *The History of 100 Years of Women's Health Care at Planned Parenthood,* Jan. 17, 2017, https://www.youtube.com/watch?v=VqYspn7PZmQ (acknowledging that "there's no question that Margaret left behind a conflicting

legacy" but asserting that "*[r]acism and ableism do not have a place at Planned Parenthood and sure as [expletive] don't represent the organization's commitment to equality*").

Demographic data tell a different story. Minority babies in America are at far greater risk from abortion than white babies. In parts of this country, black babies are more likely to be aborted than they are to be born alive. *See, e.g.,* N.Y. State Dep't of Health, Table 23: Induced Abortion and Abortion Ratios by Race/ Ethnicity and Resident County New York State - 2013, Vital Statistics of N.Y. State 2013, *available at* https://www.health.ny.gov/statistics/vital_statistics/2013/table23.htm (noting that in New York City in 2013, 1180 black babies were aborted for every 1000 live births, compared to 240 white babies). In 2014, the rate of abortion among black women was 3.5 times the abortion rate among white women. *See* Tara C. Jatlaoui et al., *Ctrs. for Disease Control & Prevention, Abortion Surveillance - 2014, Morbidity and Mortality Weekly Report,* Vol. 66, No. 24 (Nov. 24, 2017), at 1-48, *available at* https://www.cdc.gov/mmwr/volumes/66/ss/ss6624a1. ***6** htm ("CDC"). In Indiana in 2017, 9.7% of the state population was black but black women had 30.6% of the state's abortions. *See* Indiana State Dep't of Health, Terminated Pregnancy Report 2017 10, *available at* https://www.in.gov/isdh/files/2017%20 Indiana%20Terminated %C20Pregnancy%20Report.pdf; United States Census Bureau, Quick Facts: Indiana, https://www.census.gov/quickfacts/in (last visited Nov. 8, 2018). The numbers are similarly grim for Hispanic babies. *See, e.g.,* N.Y. State Dep't of Health, *supra* (610 Hispanic babies were aborted per 1000 live births in New York City in 2013, compared to 240 white babies).

Abortion advocates contend that preexisting cultural and socioeconomic factors have caused these racial disparities. *See, e.g.,* Preterm, *A Commitment to Racial Justice* (2018), www.preterm.org/racial-justice ("Because of racial injustice, women of color are both more likely to need abortions, and less likely to be able to afford them. For us, reproductive justice includes racial justice."). By the industry's account, its provision of abortion in significantly higher rates to minority women than to white women is a beneficent response to the minority population's greater "need," rather than a function of anything that the abortion industry has done to inflate demand in the minority population. But these claims are belied by the industry's business and marketing practices.

A study based on 2010 Census data reveals that Planned Parenthood has located 79% of its surgical abortion centers within walking distance of ***7** minority-dense neighborhoods. *See* Susan W. Enouen, Life Issues Institute, *New Research Shows Planned Parenthood Targets Minority Neighborhoods,* Life Issues Connector (Oct. 2012), http://www.protectingblacklife.org/ pdf/PP-Targets-10-2012.pdf; *see also* Mark Crutcher et al., Life Dynamics Inc., *Racial Targeting and Population Control* 22, 2011, https://issues4life.org/pdfs/racial_targeting_population_control.pdf (reporting based on census-based study of family planning clinics that "there is not one state in the union without population control centers located in zip codes with higher percentages of blacks and/or Hispanics than the state's overall percentage"). [2]

2 Planned Parenthood tried to counter this analysis of the Census data with a Guttmacher Institute study allegedly finding that only a small percentage of Planned Parenthood clinics are located in "majority-black neighborhoods," but Guttmacher's study was carefully manipulated to produce a misleading result. *See* Willis L. Krumholz, *Yes, Planned Parenthood Targets and Hurts Poor Black Women,* The Federalist, Feb. 18, 2016, http://thefederalist.com/2016/02/18/ yes-planned-parenthood-targets-and-hurts-poor-black-women/ (explaining the defects in the Guttmacher data and its misinterpretation by defenders of Planned Parenthood).

Planned Parenthood claims that locating their clinics near minority communities is part of their outreach to those most in "need" of their services. *See, e.g.,* Hilary Cadigan, *Planned Parenthood moves to EAV,* Creative Loafing, June 16, 2017, https:// creativeloafing.com/content-266693-Planned-Parenthood-moves-to-EAV ("Rollins School of Public Health graduate students from Emory University conducted a relocation analysis to identify strategic locations for the Atlanta ***8** health center. The East Atlanta site is located in an area of need for our sexual and reproductive health services. ..."). But community health centers, which provide medical services to low-income patients, are not similarly concentrated in minority neighborhoods; they perceive needs for their services in other communities as well. *See* Charlotte Lozier Institute, *Maps: Health Clinics Nationwide Compared to Planned Parenthood Centers,* Aug. 21, 2015, https://lozierinstitute.org/health-clinics-nation wide-compared-to-planned-parenthood-centers/. Only a provider that receives the lion's share of its revenues as payment for abortions has made the deliberate strategic choice to locate its surgical abortion clinics near high-density minority communities. Willis L. Krumholz,

Planned Parenthood's Big Bad Business Model, The Federalist, Oct. 27, 2015, http://thefederalist.com/2015/10/27/ planned-parenthoods-big-bad-business-model/ ("revenue from abortion provides the highest profit margins, and is the biggest contributor to [Planned Parenthood] affiliates' total profit").

Since Planned Parenthood began to concentrate its abortion services intentionally in minority communities, the number of minority abortions has dramatically increased while the abortion rate among white women has declined. *See* Susan W. Enouen, Life Issues Institute, *More Evidence Planned Parenthood Markets Abortion to Minorities,* June 14, 2016, https:// www.lifeissues.org/2016/06/pp-markets-abortion-minorities/ ("[F]rom 1990 to 2008, before and after Planned Parenthood's reinvention, the percentage of abortions ***9** received by Black women increased by 9.0%; for Hispanic women it rose 7.6% while the percentage of abortions received by white women declined by 11.1%."). Not coincidentally, during the same interval, Planned Parenthood's revenues have skyrocketed. *See* Willis L. Krumholz, *Guttmacher Erases Data To Protect Planned Parenthood, IUDs,* The Federalist, Apr. 12, 2016, http://thefederalist.com/2016/04/12/ guttmacher-erases-data-to-protect-planned-parenthood-iuds/ (exposing the Guttmacher Institute's manipulation of data to mask the fact that Planned Parenthood had increased its profits by altering its business model in such a way as to bring about a dramatic increase in minority abortion rates).

In addition to deliberately situating their abortion clinics close to minority communities, Planned Parenthood also makes a concerted marketing effort to encourage such communities to avail themselves of its abortion services. For example, Planned Parenthood's "Black Community" Twitter feed makes public statements encouraging black women to support and patronize Planned Parenthood, such as: "If you're a Black woman in America, it's statistically safer to have an abortion than to carry a pregnancy to term or give birth." @PPBlackComm, Twitter, XX/XX/2017, 8:13 AM, https://twitter.com/ppblackcomm/ status/9253803 07242582016?lang=en.

Given its strategic location of abortion clinics near minority neighborhoods and its blatant marketing of abortion to the minority community, the abortion industry's claims to bear no responsibility for the ***10** staggering numbers of minority abortions beggars belief. *See* Crutcher et al., *supra* (noting that "these patterns are routinely considered indicative of racial targeting when it comes to other issues," such as when civil rights advocates criticize tobacco and alcohol companies for concentrating their retail and marketing efforts disproportionately in minority neighborhoods).

C. Socioeconomic factors alone do not explain the different treatment of racial minorities.

Abortion is not the only instance of the medical community treating minority patients differently from their white counterparts. In a 2002 study, the Institute of Medicine ("IOM") found that "[e]vidence of racial and ethnic disparities in healthcare is, with few exceptions, remarkably consistent across a range of illnesses and healthcare services." Inst. of Med., Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care 5 (2002), *available at* https://www.nap.edu/read/10260/ chapter/1#ii ("IOM"); *see also* Tara Culp-Ressler, *Challenging Medical Racism and Physicians' Preference for White Patients,* Think Progress, Feb. 23, 2015, https://thinkprogress.org/ challenging-medical-racism-and-physicians-preference-for-white-patients-59bec589df88/.

Such disparities are not attributable to socioeconomic differences, the IOM observed: "The majority of studies … find that racial and ethnic disparities remain even after adjustment for socioeconomic ***11** differences and other healthcare access-related factors." *Id.; see also* Erin Peterson et al., *Why childbirth is a death sentence for many black moms,* Oct. 13, 2018, https://www.11alive.com/article/news/investigations/mothers-matter/ why-childbirth-is-a-death-sentence-for-many-black-moms/85-604079621 ("Black women die at higher rates regardless of their education, how much money they make or preexisting conditions."). Rather, research suggests "that healthcare providers' diagnostic and treatment decisions, as well as their feelings about patients, are influenced by patients' race or ethnicity." IOM, *supra,* at 11. Among other studies, the IOM cited one that "found that doctors rated black patients as less intelligent, less educated, more likely to abuse drugs and alcohol, more likely to fail to comply with medical advice, more likely to lack social support, and less likely to participate in

cardiac rehabilitation than white patients, even after patients' income, education, and personality characteristics were taken into account." IOM, *supra,* at 11.

Planned Parenthood itself has decried the racial disparities in the delivery of healthcare services and has acknowledged that such disparities cannot be explained solely by socioeconomic factors:

> [E]ven after accounting for socioeconomic factors, educated, middle-class Black women were found to be at even higher risk of having smaller, premature babies with a lower chance of survival. A growing body of research is linking racism-related stress and chronic worry about racial discrimination with Black-White ***12** disparities. The U.S. has a legacy of reproductive oppression which may cause some women to delay getting care. And unconscious bias may also play an important role.

Birth Outcome Disparities Among Black Women, Planned Parenthood of the Pacific Southwest, Inc., Blog (Mar. 2, 2018, 11:04 PM), https://www.plannedparenthood.org/planned-parenthood-pacific-southwest/ blog/birth-outcome-disparities-among-black-women.

In Planned Parenthoods's narrative, abortion is always described as part of the *solution* to these disparities - not part of the problem. *See id.* (recommending "reproductive life planning and pre-conception care services offered at [Planned Parenthood]" as part of the path "to better birth outcomes for Black women"); *see also* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture,* 11 Guttmacher Policy Review 3, Aug. 6, 2008, *available at* https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture. Abortion advocates never acknowledge that the correlation of the concentration of abortion clinics near minority communities with *increasing* unintended pregnancy and abortion *in those same communities* suggests at least that "reproductive life planning" services are not *improving* outcomes for minority women.

In fact, the correlation between increased access to abortion services and poorer health outcomes suggests that the abortion industry is harming those women. Despite the barriers to collecting data about abortion, scientists are increasingly able to document ***13** connections between abortion and the negative health outcomes that afflict minority communities. *See, e.g.,* Brent Rooney et al., *Does Induced Abortion Account for Racial Disparity in Preterm Births, and Violate the Nuremberg Code?,* J. Am. Phys. & Surgeons, Winter 2008, at 102, *available at* http://www.jpands.org/vol13no4/ rooney.pdf (documenting a link between preterm birth and prior induced abortion). Occasionally, extreme instances of such outcomes even appear in the media. *See, e.g.,* Rosemary Parker, *Dead woman's ultrasound showed clot, problems after abortion, records show,* MichiganLive, Apr. 13, 2017, https://www.mlive.com/news/kalamazoo/index.ssf/2017/04/ dead_womans_ultrasound_showed.html (documenting the death of a young black woman after an abortion at Planned Parenthood); Matthew Hay Brown, *Abortion opponents want tighter regulations,* The Baltimore Sun, Mar. 2, 2011, https://www.baltimoresun.com/ bs-mtblog-2011-03-abortion_opponents_want_tighte-story.html (reporting tragic outcomes after abortion, including the death of a young black woman).

Perhaps it is unsurprising that abortion advocates deny that racial bias could infect the abortion industry, but there is no objective reason to doubt that racial bias exists at least as much in that industry as it does everywhere else. Just like other medical treatments, the available data confirm that the racial disparities in the incidence of abortion are not reducible to socioeconomic disparities. There are roughly twice as many poor white women in the United States as there are poor black women, and yet poor black women account ***14** for more of the nation's abortions (14.1%) than poor white women do (11.7%).*See* Rachel K. Jones & Megan L. Kavanaugh, *Changes in Abortion Rates Between 2000 and 2008 and Lifetime Incidence of Abortion,* 117 Obst. & Gyn. 1358-66 (June 2001). Thus, poverty can't be the whole story. Disparities in access cannot be a sufficient explanation either, since Planned Parenthood has made its services even more available to minority populations than to disadvantaged members of other groups, and its efforts have not slowed the increasing rate of minority abortions.

It is widely acknowledged that - consciously or unconsciously - the medical community treats minority patients differently than it treats similarly-situated white patients. There is no reason to believe that there is any *less* racism at work in the abortion context. Moreover, considering the abortion industry's history as an explicitly racist social movement, its unapologetic targeting of minority communities even to this day, and the increasingly poor health outcomes of the communities it claims to serve, there is every reason to believe that racism plays a profound role in the delivery of abortion services. *See* TooManyAborted.com, *The Negro Project,* http://www.toomanyaborted.com/thenegroproject/ (last visited Nov. 13, 2018) (noting the continuing effects of Margaret Sanger's "Negro Project" on today's black communities); Tanya L. Green, *The Negro Project: Margaret Sanger's EUGENIC Plan for Black America,* BlackGenocide.org, http://www.blackgenocide.org/archived_articles/negro.html (last visited Nov. 13, ***15** 2018) (describing the Negro Project and its unfortunate ongoing legacy).

II. Sex-Selection Abortions are a Reality in the United States.

Abortions for the purpose of eliminating a baby of an undesired sex occur frequently in the United States. Because women seeking abortions are not routinely required to declare their motivation, there are no statistics showing precisely how often sex selection is a motive, or the only motive, in seeking an abortion. *See* Sujatha Jesudason & Susannah Baruch, *Sex Selection: What Role for Providers,* 86 Contraception 6, 597 (2012), *available at* https://www.contraceptionjournal.org/article/S0010-7824(12)00796-2/pdf (acknowledging lack of "official data on the frequency of pre- or during-pregnancy sex selection," but provider experience and media coverage indicating it is a common practice). But data from the few groups with a known single-gender preference, widespread acceptance of other types of sex-selective reproductive technology, and mainstream defense of the right to sex-selective abortion all demonstrate that sex-selective abortion is a reality in the United States.

A. Available statistics reflect widespread use of sex-selective abortion.

Sex-selective abortion is not typically detectible in birth rate statistics because it can be used to eliminate either sex, but where a cultural group has a ***16** single-gender preference, the results of sex-selection abortion can be seen in altered sex ratios at birth (SRBs). Studies of data from the "Asian-Pacific" population, which is characterized by "son-preference," from the 2000 census revealed "[n]aturally impossible SRBs within particular ethnic groups. ..." Nicholas Eberstadt, *The Global War Against Baby Girls,* The New Atlantis, Fall 2011, *available at* https://www.thenewatlantis.com/publications/ the-global-war-against-baby-girls. In other words, the sex-ratios at birth of the children of Americans of Asian-Pacific origin were skewed so far from what is naturally possible that the use of sex-selection to avoid the birth of daughters is undeniable. Moreover, the sex-ratios at birth became more sharply distorted among babies later in birth-order, which "strongly suggest[s] that sex-selective abortions were the driver." *Id.;* Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data,* 1 Am. Econ. J.: Applied Econ. 2, 1, 3, 7, 15, 25-26 (2009), *available at* https://pdfs.semanticscholar.org/ 8f71/b2fb8f1184351113414f5d4201e02fb70e95.pdf (concluding that Chinese and Indian parents were more likely to have a son at their third and fourth births than the other ethnic groups that were studied); Kelsey Harkness, *Sex Selection Abortions are Rife in the U.S.,* Newsweek, Apr. 14, 2016, *available at* https://www.newsweek.com/sex-selection-abortion-rife-us-447403; *see also* Sunita Puri et al., *"There Is Such a Thing as Too Many Daughters, but Not Too Many Sons": A Qualitative Study of Son Preference and Fetal Sex Selection Among Indian Immigrants in the United States,* 72 Soc. Sci. & Med. 1169 (2011) (study of 65 Indian ***17** immigrant women "found that 40% of the women interviewed had terminated prior pregnancies with female fetuses and that 89% of women carrying female fetuses in their current pregnancy pursued an abortion").

Although statistics can only reflect the practice when there is a single gender preference, there is no reason to believe that only women in cultures with a "son-preference" have availed themselves of sex-selective abortion in the United States. Medical providers in the United States often cater to the preferences of prospective parents to achieve a certain "family balance" in terms of number and gender of children. Jesudason & Baruch, *supra,* at 597 (elaborating on "family balancing" as a motive for sex selection). This "family balancing" motivation for sex-selective abortions exists wherever pre-natal diagnosis and abortion are both available, and its prevalence is evident in the lucrative "reproductive technology" industry.

B. Americans freely make use of reproductive technologies for the purpose of selecting a child of a particular sex.

Although abortions for the purpose of sex-selection are not susceptible to data tracking, it is well established that Americans embrace several other reproductive technologies for the purpose of choosing a future baby's sex, including one that, like abortion, ends the lives of one's own already-conceived genetic offspring. A lucrative industry has developed around ***18** offering prospective parents the ability to select their baby's gender via pre-implantation genetic diagnosis ("PGD"). Jasmeet Sidhu, *How to Buy a Daughter: Choosing the sex of your baby has become a multi-million-dollar industry,* Slate.com, Sept. 14, 2012, *available at* http://www.slate.com/articles/health_and_science/medical_examiner/2012/09/sex_selection_in_babies_through_pgd_americans_are_paying_to_have_daughters_rather_than_sons_.html ("Gender selection now rakes in revenues of at least $100 million every year.").

PGD refers to the testing of embryos generated by in vitro fertilization for particular traits. *Id.* Once the embryos are sorted by trait, parents may choose which to implant in a women's uterus in order to bear a baby with the desired characteristic. PGD is used throughout the world for diagnostic purposes, but the United States is one of the only countries in which PGD is legal for non-medical reasons such as sex-selection. *Id.* ("It is illegal for use for nonmedical reasons in Canada, the U.K., and Australia."); Michelle J. Bayefsky, *Comparative preimplantation genetic diagnosis policy in Europe and the USA and its implications for reproductive tourism,* 3 Reprod. Biomedicine & Soc. Online 41 (2016) ("The USA stands apart in its laissez-faire approach towards the use of PGD."). Accordingly, the United States has become a destination for "medical tourism" in this area.

A 2004 study found that 40% of Americans had no concern about PGD as a means of selecting the gender of future children. Genetics & Public Policy Center, ***19** Reproductive Genetic Testing: What America Thinks 11 (2004), *available at* https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/976/ReproGenTestAmericaThinks.pdf?sequence=1&isAllowed=y. "A 2006 survey by Johns Hopkins University found that 42 percent of fertility clinics offered PGD for gender selection. ... [And] that was ... before many clinics undertook aggressive online marketing campaigns to drive the demand." Sidhu, *supra; see also* Bayefsky, *supra* ("Elective sex selection is reported to account for 9% of PGD uses in the USA."). PGD is popular with women because unwanted embryos are destroyed prior to implantation in the uterus, which avoids the need for a physically and emotionally taxing abortion. However, PGD is by no means easy: it involves medical procedures to harvest eggs and implant embryos; it is extremely costly; and it does not always yield viable embryos. *See, e.g.,* Sidhu, *supra.*

A less invasive and less costly method of trying to pre-select a baby's sex is "sperm sorting," which involves centrifugally sorting a sperm sample by weight into groups of sperm that are more or less likely to include a Y chromosome, then using a preferred group of sperm for IVF or artificial insemination. World Health Org. Genomic Resource Ctr., *Gender and Genetics: Genetic Technologies for Sex-Selection, Prefertilization,* http://www.who.int/genomics/gender/en/index4.html (last visited Nov. 13, 2018). This method of gender selection is far less invasive than PGD and far less expensive, but it is also far less reliable, with success rates of only 75 to 85%. *Id.*

***20** Sperm sorting is widely available in the United States, but at $1500 per attempt, it is still out of reach to most prospective parents, and, in up to 25% of cases, it yields an unwanted child of the opposite sex. *See id.*; *see also, e.g.,* Sidhu, *supra* (detailing the history of a mother who tried sperm sorting to achieve a female child, conceived a male she considered aborting, then went into debt for two rounds of IVF and PGD).

The demand within the United States for procedures such as PGD and sperm-sorting evidences a societal embrace of using reproductive technology for sex-selection. A culture in which the wealthy are engaging in PGD and sperm-sorting undoubtedly includes many who are pursuing the same result through the less costly means of sex-selective abortion.

C. Unlike most of the world, American abortion activists defend the choice to abort a fetus because of a preference for the other sex.

Fearing any narrowing of a woman's right to choose abortion, abortion proponents in the United States and the United Kingdom openly call for protecting the right to abort because of a preference for one sex or another: "If the U.S. Supreme Court thinks sex selection is sexist, more states will begin to chip away at a woman's reasons for terminating her pregnancy." Sital Kalantry, *Challenging the Narrative on Sex-Selective Abortion Bans,* Ms. Magazine Blog (Aug. 25, 2017). They recognize the inconsistency between ***21** viewing abortion as an absolute right and prohibiting certain reasons for choosing abortion: "Banning sex-selective abortion opens up a world in which there is such thing as a "good" and "bad" reason for an abortion." Pam Lowe, *Why I oppose a ban on sex-selection abortion,* The Conversation, Jan. 26, 2015, http://theconversation.com/why-i-oppose-a-ban-on-sex-selection-abortion-36684. "What could stop a state from banning abortions for reasons the majority regards as "trivial," such as wanting to complete one's education or be successful in a career?" Bonnie Steinbock, *Preventing Sex-Selective Abortions in America: A Solution in Search of a Problem,* The Hastings Center, Apr. 4, 2017, https://www.thehastingscenter.org/ preventing-sex-selective-abortions-america-solution-search-problem/.

Thus, faced with legislation prohibiting sex discrimination by means of sex-selective abortion, even civil rights activists condemn such legislation as a "burden on women obtaining abortions that they want for whatever reason." Kelly P. Kissell, *Arkansas considers banning 'sex-selection' abortions,* APnews.com, Feb. 9, 2017, https://apnews.com/c4c4d2f92b634a8f8c9d31 1b4c385fa9 (quoting Rita Sklar, executive director of Arkansas ACLU). "Once again, the call for government intervention to prevent sex selective abortion conflicts with the preservation of reproductive rights." Daniel Goodkind, Sex-Selective Abortion, Reproductive Rights and the Greater Locus of Gender Discrimination in Family Formation: Cairo's Unresolved Questions 16 (1997), *available at* https://www.psc.isr.umich.edu/pubs/pdf/rr97-383.pdf. "[E]ven the most ***22** terrible reason for having an abortion holds more sway than the best imaginable reason for compelling a woman to carry to term." Sarah Ditum, *Why Women Have a Right to Sex-Selective Abortion,* The Guardian, Sep. 19, 2013, https://www.theguardian.com/commentis free/2013/sep/19/sex-selective-abortion-womans-right.

Given public support for using reproductive technology to choose the gender of born children, as well as cultural defense of sex-selective abortion, and data from son-preferring ethnic groups, it is impossible to deny that abortions for the purpose of sex-selection are routinely being performed in the United States.

III. Abortion for the Purpose of Eliminating a Disabled Person is Commonplace in the United States.

A 2012 study of Down syndrome terminations in the United States demonstrates that prospective parents choose to terminate approximately 67% of fetuses diagnosed prenatally with Down syndrome. J.L. Natoli et al., *Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995-2011),* 32 Prenatal Diagnosis 142 (2012), *available at* https://www.ncbi.nlm.nih.gov/pubmed/22418958. The number of births of people with Down syndrome in the United States is therefore 30% below natural rates. Gert de Graaf et al., *Estimates of the live births, natural losses, and elective terminations with Down syndrome in the United States,* 167A Am. J. Med. Genetics 756 (2015).

***23** These numbers do not rival the decimation in Down syndrome populations in places like Iceland, where only one or two babies are born with Down syndrome per year, or Denmark, where only four prenatally diagnosed Down syndrome babies were born in 2016. Jerome Lejeune Foundation, *All Danish babies with Down syndrome aborted but 4 in 2016,* Dec. 22, 2017, https://lejeunefoundation.org/denmark-downsyndrome-abortion/. However, the United States' termination rate is sufficient to raise concern, particularly given that Down syndrome is the most common and among the least debilitating of the disorders that can be diagnosed prenatally. Lindsay Abrams, *Prenatal Testing: Earlier and More Accurate Than Ever,* The Atlantic, Nov. 5, 2012, *available at* http://www.theatlantic.com/health/archive/2012/11/ prenatal-testing-earlier-and-more-accurate-than-ever/264472/2/. People with Down syndrome can live lives of ordinary length and function well enough to live independently and be employed. National Down Syndrome Society, *Down Syndrome Facts,* https://www.ndss.org/about-down-

syndrome/down-syndrome-facts/ (last visited Nov. 13, 2018). Though less thoroughly documented, fetuses diagnosed with more debilitating disorders are undoubtedly aborted at higher rates even than 67%. *See, e.g.,* I.C. Lakovschek et al., *Natural outcome of trisomy 13, trisomy 18, and triploidy after prenatal diagnosis,* 155A Am. J. Med. Genetics 2626 (2011) (studying a population of prenatally diagnosed fetuses with triploidy, trisomy 13, and trisomy 18, and finding that 78% of cases were terminated, so only 22% remained for a study of "natural outcomes").

***24** Government has myriad legitimate interests in preventing the termination of disabled fetuses. Disability rights activists argue that aborting a fetus on the basis of disability is the vilest form of disability discrimination, victimizing the disabled "at their most vulnerable stage." Grazie Pozo Christie, *Eugenics and Equality Can't Mix: Aborting babies with detected disabilities is incompatible with equality,* U.S. News & World Report, Aug. 26, 2016, *available at* https://www.usnews.com/opinion/articles/2016-08-26/ eugenic-abortion-is-a-challenge-to-equality-for-people-with-disabilities. In addition to moral concerns, a high rate of terminations raises practical concerns for the future diversity of the United States, because the practice of eliminating disabled people may become self-perpetuating: more terminations of disabled fetuses "could in turn result in increased social pressure to terminate, particularly if the diagnosed conditions were to become rarer in society resulting in a decline of support services (e.g. respite care homes for Down's [sic] Syndrome families). In practice, it could become increasingly difficult for a patient who has received a positive test result not to 'choose' to abort." Caroline Wright, PHG Foundation, Cell-free fetal nucleic acids for non-invasive prenatal diagnosis: report of the uk expert working group 17 (2009), *available at* http://www.phgfoundation.org/documents/214_1260287360.pdf. Moreover, eliminating most people with disabilities raises grave concerns for the lives of those who do live with disabilities. In addition to dwindling support for their unique challenges, increasing rarity and the sense of ***25** disability being "avoidable" is likely to increase the stigma associated with disability. *Id.* at 29.

IV. Eugenic Abortions are Likely to Become More Common in the U.S. As Non-Invasive Prenatal Diagnostic Tools are Increasingly Available and Increasingly Sophisticated.

Compounding the timeless objections to determining which humans will be born based on traits like sex and disability is the strong likelihood that the practice of trait-selective abortion is going to grow exponentially in frequency because of the widespread use of non-invasive prenatal diagnostic ("NIPD") technology. *See* Erin Biba, *This Simple Blood Test Reveals Birth Defects - And the Future of Pregnancy,* Wired Magazine, XX/XX/2012, https://www.wired.com/2012/12/ff-prenatal-testing/; Henry T. Greely, *Get Ready for the Flood of Fetal Gene Screening,* 469 Nature 289, 289 (2011). In the past several years, new NIPD tests have become available, both through providers and over-the-counter, that indicate very early in pregnancy the various genetic features of babies, including sex and disability status. *See, e.g.,* Abrams, *supra;* Carolyn Y. Johnson, *DNA Blood Test Can Detect Prenatal Problems,* Boston Globe, Feb. 26, 2014, *available at* http://www.bostonglobe.com/lifestyle/health-wellness/2014/02/26/ new-study-suggests-prenatal-genetic-tests-could-offered-all-pregnant-women/ V1GQuRL4jkr1M60e1XcQCK/story.html.

***26** The new tests, which evaluate fetal DNA present in the mother's blood, have three major advantages over past methods of prenatal testing: (1) they are noninvasive of the uterus because they require only a maternal blood test, (2) they are increasingly inexpensive as the technology becomes more widespread, and (3) they are accurate very early in pregnancy. Jaime S. King, And *Genetic Testing for All ... The Coming Revolution in Non-Invasive Prenatal Genetic Testing,* 42 Rutgers L. J. 599, 616 (2011). As a result of all of these features, medical and social commentators agree that the incidence of trait-selective abortion is likely to greatly increase in the coming years. *See, e.g.,* Wright, *supra,* at 19 ("The major ethical concern in this area is therefore that prenatal fetal sex determination, in combination with termination of pregnancy, could result in sex selection for non-medical or 'trivial' reasons, which could have major implications for society."); Michael Stokes Paulsen, *It's a Girl,* Public Discourse, Oct. 24, 2011, https://www.thepublicdiscourse.com/ 2011/10/4149/ ("Watch for a spike in abortion rates over the next few years as parents find it easier and cheaper to 'choose' to have a boy by killing the fetus if … it's a girl").

V. Anti-Discrimination Laws Like HEA 1337 are a Reasonable Legislative Response to Odious Social Practices.

The Court should grant certiorari in order to vindicate states' rights to pass sensible legislation designed to address the troubling phenomenon of ***27** discrimination based on race, gender, and disability in the abortion context. The State of Indiana undeniably has a legitimate interest in trying to end discrimination against racial minorities, the female sex, and disabled persons. There is ample evidence, from this country and others, to support the enactment of legislative prohibitions as one strategy for combating such invidious discrimination.

For example, although racial discrimination in medicine is a complicated issue that defies simple solution, the Institute of Medicine recommended enforcement of anti-discrimination laws as one strategy for addressing it. *See* IOM, *supra,* at 187-88. There is no reason to think that enforcing a prohibition on racial discrimination in the abortion industry would contribute any less to ameliorating the gross racial disparities in that setting.

Meanwhile, as noted above, many countries prohibit sex discrimination in the context of other reproductive technologies. *See supra* Section II.B. Some countries also prohibit sex-selective abortion,[3] while ***28** others are considering banning it.[4] And as Petitioners have pointed out, many other States have already enacted laws banning abortions on the basis of race, gender, or disability. *See* Pet. for Cert, at 25.[5]

3 *See, e.g.,* Chinadaily.com, *China bans selective abortion to fix imbalance,* July 16, 2004, http://www.chinadaily.com.cn/ english/ doc/2004-07/16/content_349051.htm; Arindam Nandi & Anil Deolalikar, *Does a legal ban on sex-selective abortions improve child sex ratios? Evidence from a policy change in India,* 103 J. of Devel. Econ. 216 (2013) (arguing that India's ban on sex-selective abortions has had a positive impact on that country's gender imbalance), *available at* https://econpapers.repec.org/article/ eeedeveco/ v_3a103_3ay_3a2013_3ai_3ac_3ap_3a216-228.htm.

4 *See, e.g.,* Adam Forrest, *Early Gender tests 'leading to selective abortions of girls in UK',* Independent, Sept. 17, 2018, https:// www.independent.co.uk/news/health/ selective-abortions-gender-tests-girls-uk-labour-a8540851.html (discussing a movement in the UK to ban sex-selective abortion).

5 Eight state laws outlawing sex-selective abortion: Ariz. Rev. Stat. Ann. § 13-3603.02; Ark. Code Ann. § 20-16-1904 (eff. Jan. 1, 2018); Kan. Stat. Ann. § 65-6726; N.C. Gen. Stat. § 90-21.121; N.D. Cent. Code § 14-02.1-04.1; Okla. Stat. tit. 63, § 1-731.2; 18 Pa. Cons. Stat. § 3204; S.D. Codified Laws § 34-23A-64. One state law banning abortions on the basis of race: Ariz. Rev. Stat. Ann. § 13-3603.02. Three state laws banning abortions on the basis of genetic abnormality: La. Rev. Stat. Ann. §40:1061.1.2; N.D. Cent. Code §14-02.1-04.1; Ohio Rev. Code Ann. § 2919.10.

Banning abortions on the basis of race, gender, and disability is a prudent - even laudable - step for a legislature seeking to deter increasingly widespread eugenic practices that devalue and disadvantage the most vulnerable members of society. This Court should not permit the Seventh Circuit decision invalidating such a ban to stand.

***29 CONCLUSION**

The Supreme Court should grant certiorari in this case in order to reverse the Seventh Circuit and affirm that States may prohibit abortion based on a baby's race, gender, or disability.

Respectfully submitted,

Thomas L. Brejcha

Counsel of Record

Sarah E. Pitlyk

Stephen M. Crampton

Thomas More Society

309 W. Washington Street, Suite 1250

Chicago, Illinois 60606

(312) 782-1680

tbrejcha@thomasmoresociety.org

Counsel for Amici Curiae, The Restoration Project; Pastor Joseph Parker, pastor of Greater Turner Chapel AM.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society

November 15, 2018

End of Document

Written Questions for Sarah Pitlyk
Submitted by Senator Patrick Leahy
October 2, 2019

1. In 2018, you were quoted in an interview stating "[t]he fate of *Roe v. Wade* is really not what's going to determine the fate of abortion in America. . . . It's really just a distraction." In speeches you have also characterized the Supreme Court's jurisprudence on abortion as "thoroughly activist." If confirmed as a United States District Court judge, you would be tasked with faithfully applying Supreme Court precedent.

(a) Do you believe *Roe v. Wade*, *Planned Parenthood v. Casey*, and other Supreme Court abortion opinions are settled law?

The Supreme Court has reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973) in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and it reaffirmed both of those decisions in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and other cases.

(b) If confirmed, do you believe that you will be able to faithfully apply this precedent?

Yes, if confirmed, I would fully and faithfully apply Supreme Court and Eighth Circuit precedents relating to abortion.

(c) Given the strong public stances you have taken against abortion, would you recuse yourself from any and all cases relating to abortion?

I fully comprehend the difference between the role of an advocate and the role of a judge, and—if I am confirmed—I will take my oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" very seriously. 28 U.S.C. § 453.

Because every recusal decision is fact-specific, I don't think it is possible assess the issue hypothetically, but I will recuse from any case in which my impartiality "might reasonably be questioned," as required by 28 U.S.C. § 455(a), and in any of the circumstances specifically prescribed by 28 U.S.C. § 455(b). In response to any party's concern about my impartiality, I will carefully consult all relevant rules and precedents, and I will confer with both parties, with my chief judge and colleagues, and as necessary, with ethics specialists at the Administrative Office for the U.S. Courts.

2. In your brief for *Box v. Planned Parenthood of Indiana* you argued that there is a "correlation between increased access to abortion and poorer health outcomes" leading you to conclude that "the abortion industry is harming those women."

The brief did not "conclude" that the abortion industry was causing harm to minority communities; it pointed out that the available data *suggested* that increased access to abortion services was harming rather than helping.

(a) Please provide the sources you relied upon in this claim.

The argument was based on demographic, geographic, and revenue data and analyses thereof. The brief includes citations to the primary sources upon which the arguments rested. I have attached hereto a copy of that brief.

3. The American Bar Association rated you "Not Qualified" to serve as a judge for the United States District Court.

(a) What experiences can you cite to that would assure the Committee that you are capable of performing the duties of a District Court Judge?

Over the past 11.5 years, I have represented a wide variety of clients in an even wider variety of litigation matters, from playing a small role as a new associate in giant products liability litigation at Covington to playing a central role in constitutional litigation at the Thomas More Society, and in between working with many different teams of attorneys on a whole range of litigation matters including white collar criminal defense, breach of contract disputes, municipal tax litigation, non-profit corporate governance, open records, RICO, conspiracy, civil and criminal eavesdropping, as well as numerous constitutional matters arising under the First, Fifth, and Sixth Amendments.

With respect to these matters, I have litigated issues as mundane as discrete procedural issues in trial court and as momentous as comprehensive dispositive motions and appellate briefing. I have drafted pleadings; developed factual affidavits; attended case status conferences; corresponded with clients, opposing counsel and courts; issued and answered written discovery requests; drafted pretrial evidentiary motions; worked on jury instructions, voir dire questionnaires, and witness examination outlines. I have also briefed all manner of procedural and substantive motions including motions for preliminary injunctions; motions to strike, stay, intervene, compel, transfer, and continue; proposed judgments; as well as dispositive motions and appellate briefs. I argued one of those appeals in the Ninth Circuit. I have also submitted 10 briefs to the United States Supreme Court in a variety of cases on behalf of a variety of clients. I believe this is all highly relevant to the work of a district judge.

Moreover, although the bulk of my experience has been in civil litigation, I have also worked on several criminal matters. In September I spent a week defending a client in a preliminary hearing in California state criminal court as part of a small litigation team. I had just returned from that hearing when I met with the representative of the ABA. I recounted in detail the scope of my contributions in the context of that hearing—from the preparation of exhibits to the (successful) overnight briefing of an unanticipated motion that implicated critical First and Sixth Amendment rights. I also recounted my contributions to our client's criminal defense over the past year or so in disputes relating to intervention by third parties, the proposed sealing of evidence, and the requirements of the Sixth Amendment in the context of the preliminary hearing. Finally, I told my interviewer about contributions I had made to criminal matters in the past. It was

surprising, therefore, to read (in a public letter that many, including members of the Senate Judiciary Committee, will accept as true) that I had "never participated at any stage of a criminal matter."

I acknowledge that there can be good-faith disagreement about whether my particular practice has provided me with the ideal preparation to be a district judge, but I don't think that there is any question that I can—and will—do the job well. It is true that I have specialized in written legal analysis and that none of my cases has gone to trial (until, coincidentally, this month), but that is typical of complex civil litigation, especially in federal courts. That means that a substantial (and growing) portion of the job of a district judge is also written analysis of legal questions, to which the bulk of my experience is directly relevant. I have, of course, endeavored to learn as much as possible about other aspects of the job of a district judge as I have considered the possibility of taking on that awesome responsibility, and I have concluded that I have all the tools I need to do the job well, most notably: a broad foundation of substantive and procedural expertise; the humility to recognize what I need to learn coupled with the intellect to learn it quickly and well; the work ethic and high standards to ensure excellent work product; and the temperament to conduct a courtroom and chambers with civility and respect for everyone who enters.

4. In a 2019 speech describing the work of your employer, the Thomas More Society, you highlighted the Society's defense of the "First Amendment rights of pro-life journalist-activists who have exposed illegal fetal tissue trafficking."

(a) Are these comments referencing your representation of David Daleiden in litigation arising from Daleiden's filming of Planned Parenthood officials? If not, what were those comments in reference to?

Yes, those comments do refer to my firm's representation of Mr. Daleiden.

(b) The House Committee on Oversight and Reform found that there is "no credible evidence" that Planned Parenthood has engaged in illegal fetal tissue trafficking. Do you stand by your assertion that such activists "exposed illegal fetal tissue trafficking?" If so, on what basis?

As Mr. Daleiden's attorney, I of course may not disclose anything that is protected by attorney-client privilege or that is subject to a protective order or injunction in pending litigation, so I will answer this question relying on only sources that are in the public domain.

Yes, I do stand by the claim that Mr. Daleiden and his colleagues exposed illegal fetal tissue trafficking. There are many grounds, but the most straightforward is that their 30-month-long investigation of illegal practices in the fetal tissue procurement industry led directly to the successful prosecution of two tissue procurement companies that were illegally profiting from the sale of fetal organs obtained from Planned Parenthood in Orange County. Those companies admitted guilt in a settlement that requires them to

disgorge nearly $8 million. *See* Daniel Langhorne, *Firms reach $7.8-million settlement over allegations of selling fetal tissue*, L.A. Times (Dec. 9, 2017).

5. In both your legal work and public statements you have taken strong stances against surrogacy. In a 2017 press release from the Thomas More Society, you were quoted stating, "Surrogacy also weakens society's natural abhorrence of eugenic abortion." Surrogacy allows couples who cannot otherwise carry a baby to term to start their own family.

(a) How does surrogacy weaken our society's stance against eugenic abortions? What sources do you rely on in making this claim?

That press release directly quoted our clients' statement of interest from the amicus brief we filed on their behalf documenting the physical burdens and risks of surrogacy for surrogates and their children. The statement about the relationship between surrogacy and eugenic abortion was part of the clients' broader expression of concern about surrogacy; it was not part of the brief's central argument.

(b) Is it still your belief that surrogacy harms women and society?

I made that argument on behalf of clients, including the American Association of Pro-Life Obstetricians and Gynecologists, the American College of Pediatricians, the Catholic Medical Association, and the National Association of Catholic Nurses-U.S.A., among other groups, based on data provided by those groups.

If I am confirmed to the district court, neither my former client's litigating positions nor my personal beliefs will play a role in my judicial decision-making. I understand the shift in perspective that every advocate who is nominated to the bench has to undertake, and I will take the oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" very seriously. 28 U.S.C. § 453.

6. **Chief Justice Roberts wrote in *King v. Burwell* that**

"oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.' So when deciding whether the language is plain, we must read the words 'in their context and with a view to their place in the overall statutory scheme.' Our duty, after all, is 'to construe statutes, not isolated provisions?'"

Do you agree with the Chief Justice? Will you adhere to that rule of statutory interpretation – that is, to examine the entire statute rather than immediately reaching for a dictionary?

The notion that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" is a "fundamental canon of statutory construction," and I would adhere to it if I were to be confirmed. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

7. President Trump has issued several attacks on the independent judiciary. Justice Gorsuch called them "disheartening" and "demoralizing."

(a) Does that kind of rhetoric from a President – that a judge who rules against him is a "so-called judge" – erode respect for the rule of law?

The Constitution provides for an independent federal judiciary through life tenure and salary protection precisely so that a judge will not be affected by public criticism. Nor should a judge engage in public debate. *See* Canon 5, Code of Conduct for United States Judges ("A judge should refrain from political activity").

(b) While anyone can criticize the merits of a court's decision, **do you believe that it is ever appropriate to criticize the legitimacy of a judge or court?**

Please see my answer to question 7.a.

8. President Trump praised one of his advisers after that adviser stated during a television interview that "the powers of the president to protect our country are very substantial *and will not be questioned.*" (Emphasis added.)

(a) Is there any constitutional provision or Supreme Court precedent precluding judicial review of national security decisions?

The Supreme Court has reviewed national security decisions of the President even during wartime. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

9. Many are concerned that the White House's denouncement of "judicial supremacy" was an attempt to signal that the President can ignore judicial orders. And after the President's first attempted Muslim ban, there were reports of Federal officials refusing to comply with court orders.

(a) If this President or any other executive branch official refuses to comply with a court order, how should the courts respond?

It would be improper to comment on an issue that could arise in litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

10. In *Hamdan v. Rumsfeld*, the Supreme Court recognized that the President "may not disregard limitations the Congress has, in the proper exercise of its own war powers, placed on his powers."

(a) Do you agree that the Constitution provides Congress with its own war powers and Congress may exercise these powers to restrict the President – even in a time of war?

In his *Youngstown* concurrence, Justice Jackson said the President "has no monopoly of 'war powers.'" *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 644 (1952) (Jackson, J., concurring). The Constitution divides war powers between the President and Congress. The proper exercise of those powers in particular circumstances may arise in litigation, and as such it would be inappropriate for me to comment further. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."). I would follow the precedents of the Supreme Court if I were to be confirmed.

Justice O'Connor famously wrote in her majority opinion in *Hamdi v. Rumsfeld* that: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

(b) In a time of war, do you believe that the President has a "Commander-in-Chief" override to authorize violations of laws passed by Congress or to immunize violators from prosecution? Is there any circumstance in which the President could ignore a statute passed by Congress and authorize torture or warrantless surveillance?

The Supreme Court has said that the "Founders of this Nation entrusted the law making power to the Congress alone in both good and bad times," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952), and the Supreme Court has limited the actions of the President in wartime on that basis. I would apply that precedent if I were to be confirmed. As a judicial nominee, it would not be proper to comment further on abstract questions that could arise in litigation. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

11. **How should courts balance the President's expertise in national security matters with the judicial branch's constitutional duty to prevent abuse of power?**

In general, "[t]he proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown Sheet & Tube Co. v. Sawyer*." *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006). That scheme asks whether the President is acting pursuant to congressional authorization, in the absence of congressional action, or against the expressed or implied will of Congress. If confirmed, I would faithfully apply *Youngstown*.

12. In a 2011 interview, Justice Scalia argued that the Equal Protection Clause does not extend to women.

(a) Do you agree with that view? Does the Constitution permit discrimination against women?

The Supreme Court has held that the Equal Protection Clause prohibits a government from denying "to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996). A gender-based government action is unconstitutional absent "an 'exceedingly persuasive justification' for that action." *Id.* at 531. That is a binding precedent of the Supreme Court, and I would faithfully apply it if I were to be confirmed.

13. **Do you agree with Justice Scalia's characterization of the Voting Rights Act as a "perpetuation of racial entitlement?"**

Justice Scalia's comment is not a holding of the Supreme Court with respect to the Voting Rights Act. I would faithfully apply Supreme Court precedent concerning the Voting Rights Act if I were to be confirmed.

14. **What does the Constitution say about what a President must do if he or she wishes to receive a foreign emolument?**

The Constitution provides that "no Person holding any Office of Profit or Trust under [the United States], shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. Const. art. I, § 9, cl. 8. The application of the Emoluments Clause to the President is the subject of pending litigation and therefore it would be inappropriate for me to comment. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

15. In *Shelby County v. Holder*, a narrow majority of the Supreme Court struck down a key provision of the Voting Rights Act. Soon after, several states rushed to exploit that decision by enacting laws making it harder for minorities to vote. The need for this law was revealed through 20 hearings, over 90 witnesses, and more than 15,000 pages of testimony in the House and Senate Judiciary Committees. We found that barriers to voting persist in our country. And yet, a divided Supreme Court disregarded Congress's findings in reaching its decision. As Justice Ginsburg's dissent in *Shelby County* noted, the record supporting the 2006 reauthorization was "extraordinary" and the Court erred "egregiously by overriding Congress' decision."

(a) When is it appropriate for the Supreme Court to substitute its own factual findings for those made by Congress or the lower courts?

In general, the Supreme Court relies on a factual record developed before the filing of an appeal. The scope of *Shelby County v. Holder*, 570 U.S. 529 (2013), is subject to ongoing litigation and political debate and therefore it is not proper for me to

comment. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 5 ("A judge should refrain from political activity"); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

16. **How would you describe Congress's authority to enact laws to counteract racial discrimination under the Thirteenth, Fourteenth, and Fifteenth Amendments, which some scholars have described as our Nation's "Second Founding"?**

Congress has the authority to enforce the protections of each of the amendments by "appropriate legislation." U.S. Const. amdt. XIII, § 2; U.S. Const. amdt. XIV, § 5; U.S. Const. amdt. XV, § 2. The Supreme Court has stated that, under the enforcement clause of the Fourteenth Amendment, "there must be a congruence between the means used and the ends to be achieved." *City of Boerne v. Flores*, 521 U.S. 507, 519, 530 (1997).

17. Justice Kennedy spoke for the Supreme Court in *Lawrence v. Texas* when he wrote: "liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct," and that "in our tradition, the State is not omnipresent in the home."

(a) Do you believe the Constitution protects that personal autonomy as a fundamental right?

Lawrence v. Texas, 539 U.S. 558 (2003), is a precedent of the Supreme Court, which I would faithfully apply if I were to be confirmed.

18. In the confirmation hearing for Justice Gorsuch, there was extensive discussion of the extent to which judges and Justices are bound to follow previous court decisions by the doctrine of stare decisis.

(a) In your opinion, how strongly should judges bind themselves to the doctrine of stare decisis? Does the commitment to stare decisis vary depending on the court? Does the commitment vary depending on whether the question is one of statutory or constitutional interpretation?

The Supreme Court has said that "the doctrine of stare decisis is of fundamental importance to the rule of law." *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987). It is not appropriate for a lower court to depart from Supreme Court precedent. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997).

19. Generally, federal judges have great discretion when possible conflicts of interest are raised to make their own decisions whether or not to sit on a case, so it is important that judicial nominees have a well-thought out view of when recusal is appropriate. Former Chief Justice Rehnquist made clear on many occasions that he understood that the standard for recusal was not subjective, but rather objective. It was whether there might be any appearance of impropriety.

(a) How do you interpret the recusal standard for federal judges, and in what types of cases do you plan to recuse yourself? I'm interested in specific examples, not just a statement that you'll follow applicable law.

A federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). I would evaluate every situation in which my impartiality is questioned according to the legal standards set forth in 28 U.S.C. § 455 and Canon 3C of the Code of Conduct for United States Judges, in consultation with the parties, my chief judge and colleagues, and as necessary, ethics specialists at the Administrative Office for the U.S. Courts.

More specifically, I will recuse myself from a case in which my sister, Mary Catherine Hodes, represents a party, and from any case in which a colleague from private practice served as lawyer while we were associated. *Id.* § 455(b). For a period of time, I anticipate recusing from any cases involving my current law firm.

20. It is important for me to try to determine for any judicial nominee whether he or she has a sufficient understanding the role of the courts and their responsibility to protect the constitutional rights of individuals, especially the less powerful and especially where the political system has not. The Supreme Court defined the special role for the courts in stepping in where the political process fails to police itself in the famous footnote 4 in *United States v. Carolene Products*. In that footnote, the Supreme Court held that "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation."

(a) Can you discuss the importance of the courts' responsibility under the *Carolene Products* footnote to intervene to ensure that all citizens have fair and effective representation and the consequences that would result if it failed to do so?

In the passage you quote, the Supreme Court indicated that courts have a role in ensuring that democratic processes work as intended and do not exclude citizens entitled to representation. The footnote also introduced the idea, which the Supreme Court later developed, of tiered levels of judicial scrutiny to assess constitutionality. If confirmed, I will faithfully follow those binding precedents of the Supreme Court.

21. Both Congress and the courts must act as a check on abuses of power. Congressional oversight serves as a check on the Executive, in cases like Iran-Contra or warrantless spying on American citizens and politically motivated hiring and firing at the Justice Department during the Bush administration. It can also serve as a self-check on abuses of Congressional power. When Congress looks into ethical violations or corruption, including inquiring into the Trump administration's conflicts of interest and the events discussed in the Mueller report we make sure that we exercise our own power properly.

(a) Do you agree that Congressional oversight is an important means for creating accountability in all branches of government?

Yes.

22. **Do you believe there are any discernible limits on a president's pardon power? For example, President Trump claims he has an "absolute right" to pardon himself. Do you agree?**

I have not had the occasion to study this question.

23. **What is your understanding of the scope of congressional power under Article I of the Constitution, in particular the Commerce Clause, and under Section 5 of the Fourteenth Amendment?**

Congress has the power to regulate an activity under the Commerce Clause if "the regulated activity 'substantially affects' interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). Under Section 5 of the Fourteenth Amendment, Congress has the power "to enforce" the Amendment's provisions, meaning that "there must be a congruence between the means used and the ends to be achieved." *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997).

24. In *Trump v. Hawaii*, the Supreme Court allowed President Trump's Muslim ban to go forward on the grounds that Proclamation No. 9645 was facially neutral and asserted that the ban was in the national interest. The Court chose to accept the findings of the Proclamation without question, despite significant evidence that the President's reason for the ban was animus towards Muslims. Chief Justice Roberts' opinion stated that "the Executive's evaluation of the underlying facts is entitled to appropriate weight" on issues of foreign affairs and national security.

(a) What do you believe is the "appropriate weight" that executive factual findings are entitled to on immigration issues? Does that weight shift when additional constitutional issues are presented, as in the Establishment Clause claims of *Trump v. Hawaii*? Is there any point at which evidence of unlawful pretext overrides a facially neutral justification of immigration policy?

Trump v. Hawaii, 138 S. Ct. 2392 (2018), is a precedent of the Supreme Court that I would faithfully apply if I were to be confirmed. It would not be proper for a judicial nominee to question that precedent or to resolve a hypothetical future case. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

25. **How would you describe the meaning and extent of the "undue burden" standard established by *Planned Parenthood v. Casey* for women seeking to have an abortion? I am interested in specific examples of what you believe would and would not be an undue burden on the ability to choose.**

An undue burden exists when "a state regulation has the purpose or effect of placing a

substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Planned Parenthood v. Casey*, 505 U.S. 833, 877 (1992). *Planned Parenthood v. Casey* is a binding precedent of the Supreme Court. If I were confirmed as a lower court judge, I would faithfully follow that precedent.

26. Federal courts have used the doctrine of qualified immunity in increasingly broad ways, shielding police officers in particular whenever possible. In order to even get into court, a victim of police violence or other official abuse must show that an officer knowingly violated a clearly established constitutional right as specifically applied to the facts and that no reasonable officer would have acted that way. Qualified immunity has been used to protect a social worker who strip searched a four-year-old, a police officer who went to the wrong house, without even a search warrant for the correct house, and killed the homeowner, and many similar cases.

(a) Do you think that the qualified immunity doctrine should be reined in? Has the "qualified" aspect of this doctrine ceased to have any practical meaning? Should there be rights without remedies?

The Supreme Court has reaffirmed the doctrine of qualified immunity. *See, e.g.*, *San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015). If I were confirmed, I would faithfully apply Supreme Court precedent and leave it to the Supreme Court to revise its precedents. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). Because this is an issue that is subject to litigation in the courts, it would be improper as a judicial nominee to advocate a view. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

27. The Supreme Court, in *Carpenter v. U.S.* (2018), ruled that the Fourth Amendment generally requires the government to get a warrant to obtain geolocation information through cell-site location information. The Court, in a 5-4 opinion written by Roberts, held that the third-party doctrine should not be applied to cellphone geolocation technology. The Court noted "seismic shifts in digital technology", such as the "exhaustive chronicle of location information casually collected by wireless carriers today."

(a) In light of *Carpenter* do you believe that there comes a point at which collection of data about a person becomes so pervasive that a warrant would be required? Even if collection of one bit of the same data would not?

In *Carpenter*, the Supreme Court held that because "[m]apping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts," providing "an intimate window into a person's life," the government "must generally obtain a warrant supported by probable cause before acquiring such records." 138 S. Ct. 2206, 2217, 2221 (2018). *Carpenter* is a binding precedent I would follow if I were to be confirmed.

28. Earlier this year, President Trump declared a national emergency in order to redirect funding toward the proposed border wall after Congress appropriated less money than requested for that purpose. This raised serious separation-of-powers concerns because the Executive Branch bypassed the congressional approval generally needed for appropriations. As a member of the Appropriations Committee, I take seriously Congress's constitutional duty to decide how the government spends money.

(a) With the understanding that you cannot comment on pending cases, are there situations when you believe a president can legitimately allocate funds for a purpose previously rejected by Congress?

Because this question concerns pending or impending litigation, it would be inappropriate for me to comment on the abstract question. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

29. During Justice Kavanaugh's confirmation hearing, he used partisan language to align himself with Senate Republicans. For instance, he accused Senate Democrats of exacting "revenge on behalf of the Clintons" and warned that "what goes around comes around." The judiciary often considers questions that have a profound impact on different political groups. The Framers sought to address the potential danger of politically-minded judges making these decisions by including constitutional protections such as judicial appointments and life terms for Article III judges.

(a) Do you agree that the Constitution contemplates an independent judiciary? Can you discuss the importance of judges being free from political influence?

The Constitution provides for an independent judiciary. Article III insulates judges from political influence through life tenure and salary protection. These protections enable judges to make decisions based on what the law requires rather than as a result of political pressure or public criticism. Should I be confirmed, I would be committed to deciding cases based on the law alone.

2018 WL 6042850 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Kristina BOX, Commissioner of the Indiana State Department of Health, et al., Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., et al., Respondents.

No. 18-483.
November 15, 2018.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Brief of the Restoration Project; Pastor Joseph Parker, Pastor of Greater Turner Chapel A.M.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society as Amici Curiae in Support of Petitioners

Thomas L. Brejcha, Sarah E. Pitlyk, Stephen M. Crampton, Thomas More Society, 309 W. Washington Street, Suite 1250, Chicago, Illinois 60606, (312) 782-1680, tbrejcha@thomasmoresociety.org, for amici curiae The Restoration Project; Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society.

*i TABLE OF CONTENTS

*iii TABLE OF AUTHORITIES

Statutes

*1 INTEREST OF THE AMICI CURIAE [1]

[1] Counsel for Petitioners and Respondents received timely notice of amici curiae's intent to file this brief and counsel for Petitioners and Respondents have consented to its filing. Further, as required by Supreme Court Rule 37.6, counsel certifies this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than amici curiae, their members, or their counsel.

The Restoration Project ("TRP") is a non-profit organization dedicated to rebuilding families, promoting the sanctity of life, and providing related educational materials, in order to transform American public policy and culture's impact on Black life. TRP works with pastors, ministry leaders and organizations to restore a culture of uprightness, evenhandedness, and virtue.

Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church in Greenwood, MS, has served as a pastor of different congregations for a little more than 40 years. He has been working to stand up for life against abortion for more than 20 years and is disturbed by the abortion industry's deliberate targeting of the African American community.

Everlasting Light Ministries is a comprehensive post-abortion healing and marriage ministry that seeks to heal the massive devastation of abortion and marital discord in America and especially in communities of color; proclaim the truth about abortion and its real life consequences; and sensitize communities to the needs of all post-abortive, post-miscarriage people.

***2 Protect Life and Marriage** Texas works to uphold the Judeo-Christian ethic established by our Founding Fathers in our society with the view of securing liberty for marriages, the American family and the life of the unborn.

The Thomas More Society ("TMS") is a national public interest law firm devoted to restoring respect in the law for life, the family and religious liberty. Based in Chicago, TMS accomplishes its organizational mission through litigation, education, and related activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici The Restoration Project, Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church, Everlasting Light Ministries, Protect Life and Marriage Texas, and the Thomas More Society submit this brief to aid the Court in assessing the gravity of the problem Indiana's HEA 1337 and similar state statutes seek to address. Invidious discrimination in the provision of abortion services is an entrenched and escalating phenomenon. Babies of minority mothers are aborted at a far higher rate than their white counterparts - a disturbing trend that the abortion industry intentionally and unabashedly perpetuates. With recent advances in prenatal testing technology, abortions motivated by the unborn child's gender, disability, and *3 other disfavored genetic traits are also dramatically on the rise.

HEA 1337 and similar state laws are sensible and important legislative responses to racist, sexist, and eugenic practices performed under the guise of "reproductive rights." This Court should grant certiorari in order to reverse the Seventh Circuit and reinstate HEA 1337.

ARGUMENT

I. The Delivery of Abortion Services is Infected with Racial Bias.

A. The origins of abortion are racist and eugenic.

The eugenic origins of the birth-control movement - the progenitor of the abortion rights movement - are well-established. See, *e.g.,* Rebecca A. Messall, *Margaret Sanger and the Eugenics Movement,* Human Life Rev., Spring 2010, at 98 (noting that the founders and early leaders of what became Planned Parenthood were all members of the American Eugenics Society). Margaret Sanger, the founder of the birth control organization that became Planned Parenthood, wrote:

> [T]he example of the inferior classes, the fertility of the feeble-minded, the mentally defective, the poverty-stricken classes, should not be held up for emulation to the mentally and physically fit though less fertile parents of the educated and well-to-do classes. On the *4 contrary, **the most urgent problem today is how to limit and discourage the over-fertility of the mentally and physically defective.**

Margaret Sanger, *The Eugenic Value of Birth Control Propaganda,* Birth Control Rev., XX/XX/1921, at 5, available at https://www.nyu.edu/projects/sanger/web edition/app/documents/show.php?sangerDoc=238946.xml.

Scholars of the history of the eugenics movement acknowledge that Sanger "supported some eugenic aims, and was not above voicing her contempt for the poor, disabled and minorities." Paul A. Lombardo, *Symposium Article: Disability, Eugenics, and the Culture Wars,* 2 St. Louis U. J. Health L. & Pol'y 57, 76 (2008). They also acknowledge that in Planned Parenthood's early advocacy for birth control, "[t]he organization focused on unwanted children and pathological parenting in poor African American communities. ..." Mary Ziegler, 25 Yale J.L. & Feminism 1, 13 (2013); *see also Birth Control or Race Control? Sanger and the Negro Project,* Newsletter #28 (The Margaret Sanger Papers Project, New York University, New York, NY), Fall 2001 (conceding that "the patriarchal racism of the time ... dictated both the Federation's and Sanger's approach to blacks and birth control"), https://www.nyu.edu/projects/sanger/articles/bc_or_race_control.php. To early advocates of birth control and abortion, minority racial groups were among "the mentally and physically defective" whose fertility they sought to limit.

*5 B. The modern abortion industry continues to target ethnic minorities.

Modern advocates of abortion disavow the racism of Planned Parenthood's founders. *See, e.g.,* Now This News, Group Nine Media, Inc., Video: *The History of 100 Years of Women's Health Care at Planned Parenthood,* Jan. 17, 2017, https://www.youtube.com/watch?v=VqYspn7PZmQ (acknowledging that "there's no question that Margaret left behind a conflicting

legacy" but asserting that "*[r]acism and ableism do not have a place at Planned Parenthood and sure as [expletive] don't represent the organization's commitment to equality*").

Demographic data tell a different story. Minority babies in America are at far greater risk from abortion than white babies. In parts of this country, black babies are more likely to be aborted than they are to be born alive. *See, e.g.,* N.Y. State Dep't of Health, Table 23: Induced Abortion and Abortion Ratios by Race/ Ethnicity and Resident County New York State - 2013, Vital Statistics of N.Y. State 2013, *available at* https://www.health.ny.gov/statistics/vital_statistics/2013/table23.htm (noting that in New York City in 2013, 1180 black babies were aborted for every 1000 live births, compared to 240 white babies). In 2014, the rate of abortion among black women was 3.5 times the abortion rate among white women. *See* Tara C. Jatlaoui et al., *Ctrs. for Disease Control & Prevention, Abortion Surveillance - 2014, Morbidity and Mortality Weekly Report,* Vol. 66, No. 24 (Nov. 24, 2017), at 1-48, *available at* https://www.cdc.gov/mmwr/volumes/66/ss/ss6624a1. ***6** htm ("CDC"). In Indiana in 2017, 9.7% of the state population was black but black women had 30.6% of the state's abortions. *See* Indiana State Dep't of Health, Terminated Pregnancy Report 2017 10, *available at* https://www.in.gov/isdh/files/2017%20 Indiana%20Terminated %C20Pregnancy%20Report.pdf; United States Census Bureau, Quick Facts: Indiana, https://www.census.gov/quickfacts/in (last visited Nov. 8, 2018). The numbers are similarly grim for Hispanic babies. *See, e.g.,* N.Y. State Dep't of Health, *supra* (610 Hispanic babies were aborted per 1000 live births in New York City in 2013, compared to 240 white babies).

Abortion advocates contend that preexisting cultural and socioeconomic factors have caused these racial disparities. *See, e.g.,* Preterm, *A Commitment to Racial Justice* (2018), www.preterm.org/racial-justice ("Because of racial injustice, women of color are both more likely to need abortions, and less likely to be able to afford them. For us, reproductive justice includes racial justice."). By the industry's account, its provision of abortion in significantly higher rates to minority women than to white women is a beneficent response to the minority population's greater "need," rather than a function of anything that the abortion industry has done to inflate demand in the minority population. But these claims are belied by the industry's business and marketing practices.

A study based on 2010 Census data reveals that Planned Parenthood has located 79% of its surgical abortion centers within walking distance of ***7** minority-dense neighborhoods. *See* Susan W. Enouen, Life Issues Institute, *New Research Shows Planned Parenthood Targets Minority Neighborhoods,* Life Issues Connector (Oct. 2012), http://www.protectingblacklife.org/ pdf/PP-Targets-10-2012.pdf; *see also* Mark Crutcher et al., Life Dynamics Inc., *Racial Targeting and Population Control* 22, 2011, https://issues4life.org/pdfs/racial_targeting_population_control.pdf (reporting based on census-based study of family planning clinics that "there is not one state in the union without population control centers located in zip codes with higher percentages of blacks and/or Hispanics than the state's overall percentage"). [2]

2 Planned Parenthood tried to counter this analysis of the Census data with a Guttmacher Institute study allegedly finding that only a small percentage of Planned Parenthood clinics are located in "majority-black neighborhoods," but Guttmacher's study was carefully manipulated to produce a misleading result. *See* Willis L. Krumholz, *Yes, Planned Parenthood Targets and Hurts Poor Black Women,* The Federalist, Feb. 18, 2016, http://thefederalist.com/2016/02/18/ yes-planned-parenthood-targets-and-hurts-poor-black-women/ (explaining the defects in the Guttmacher data and its misinterpretation by defenders of Planned Parenthood).

Planned Parenthood claims that locating their clinics near minority communities is part of their outreach to those most in "need" of their services. *See, e.g.,* Hilary Cadigan, *Planned Parenthood moves to EAV,* Creative Loafing, June 16, 2017, https:// creativeloafing.com/content-266693-Planned-Parenthood-moves-to-EAV ("Rollins School of Public Health graduate students from Emory University conducted a relocation analysis to identify strategic locations for the Atlanta ***8** health center. The East Atlanta site is located in an area of need for our sexual and reproductive health services. ..."). But community health centers, which provide medical services to low-income patients, are not similarly concentrated in minority neighborhoods; they perceive needs for their services in other communities as well. *See* Charlotte Lozier Institute, *Maps: Health Clinics Nationwide Compared to Planned Parenthood Centers,* Aug. 21, 2015, https://lozierinstitute.org/health-clinics-nation wide-compared-to-planned-parenthood-centers/. Only a provider that receives the lion's share of its revenues as payment for abortions has made the deliberate strategic choice to locate its surgical abortion clinics near high-density minority communities. Willis L. Krumholz,

Planned Parenthood's Big Bad Business Model, The Federalist, Oct. 27, 2015, http://thefederalist.com/2015/10/27/ planned-parenthoods-big-bad-business-model/ ("revenue from abortion provides the highest profit margins, and is the biggest contributor to [Planned Parenthood] affiliates' total profit").

Since Planned Parenthood began to concentrate its abortion services intentionally in minority communities, the number of minority abortions has dramatically increased while the abortion rate among white women has declined. *See* Susan W. Enouen, Life Issues Institute, *More Evidence Planned Parenthood Markets Abortion to Minorities,* June 14, 2016, https:// www.lifeissues.org/2016/06/pp-markets-abortion-minorities/ ("[F]rom 1990 to 2008, before and after Planned Parenthood's reinvention, the percentage of abortions ***9** received by Black women increased by 9.0%; for Hispanic women it rose 7.6% while the percentage of abortions received by white women declined by 11.1%."). Not coincidentally, during the same interval, Planned Parenthood's revenues have skyrocketed. *See* Willis L. Krumholz, *Guttmacher Erases Data To Protect Planned Parenthood, IUDs,* The Federalist, Apr. 12, 2016, http://thefederalist.com/2016/04/12/ guttmacher-erases-data-to-protect-planned-parenthood-iuds/ (exposing the Guttmacher Institute's manipulation of data to mask the fact that Planned Parenthood had increased its profits by altering its business model in such a way as to bring about a dramatic increase in minority abortion rates).

In addition to deliberately situating their abortion clinics close to minority communities, Planned Parenthood also makes a concerted marketing effort to encourage such communities to avail themselves of its abortion services. For example, Planned Parenthood's "Black Community" Twitter feed makes public statements encouraging black women to support and patronize Planned Parenthood, such as: "If you're a Black woman in America, it's statistically safer to have an abortion than to carry a pregnancy to term or give birth." @PPBlackComm, Twitter, XX/XX/2017, 8:13 AM, https://twitter.com/ppblackcomm/ status/9253803 07242582016?lang=en.

Given its strategic location of abortion clinics near minority neighborhoods and its blatant marketing of abortion to the minority community, the abortion industry's claims to bear no responsibility for the ***10** staggering numbers of minority abortions beggars belief. *See* Crutcher et al., *supra* (noting that "these patterns are routinely considered indicative of racial targeting when it comes to other issues," such as when civil rights advocates criticize tobacco and alcohol companies for concentrating their retail and marketing efforts disproportionately in minority neighborhoods).

C. Socioeconomic factors alone do not explain the different treatment of racial minorities.

Abortion is not the only instance of the medical community treating minority patients differently from their white counterparts. In a 2002 study, the Institute of Medicine ("IOM") found that "[e]vidence of racial and ethnic disparities in healthcare is, with few exceptions, remarkably consistent across a range of illnesses and healthcare services." Inst. of Med., Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care 5 (2002), *available at* https://www.nap.edu/read/10260/ chapter/1#ii ("IOM"); *see also* Tara Culp-Ressler, *Challenging Medical Racism and Physicians' Preference for White Patients,* Think Progress, Feb. 23, 2015, https://thinkprogress.org/ challenging-medical-racism-and-physicians-preference-for-white-patients-59bec589df88/.

Such disparities are not attributable to socioeconomic differences, the IOM observed: "The majority of studies … find that racial and ethnic disparities remain even after adjustment for socioeconomic ***11** differences and other healthcare access-related factors." *Id.; see also* Erin Peterson et al., *Why childbirth is a death sentence for many black moms,* Oct. 13, 2018, https://www.11alive.com/article/news/investigations/mothers-matter/ why-childbirth-is-a-death-sentence-for-many-black-moms/85-604079621 ("Black women die at higher rates regardless of their education, how much money they make or preexisting conditions."). Rather, research suggests "that healthcare providers' diagnostic and treatment decisions, as well as their feelings about patients, are influenced by patients' race or ethnicity." IOM, *supra,* at 11. Among other studies, the IOM cited one that "found that doctors rated black patients as less intelligent, less educated, more likely to abuse drugs and alcohol, more likely to fail to comply with medical advice, more likely to lack social support, and less likely to participate in

cardiac rehabilitation than white patients, even after patients' income, education, and personality characteristics were taken into account." IOM, *supra,* at 11.

Planned Parenthood itself has decried the racial disparities in the delivery of healthcare services and has acknowledged that such disparities cannot be explained solely by socioeconomic factors:

> [E]ven after accounting for socioeconomic factors, educated, middle-class Black women were found to be at even higher risk of having smaller, premature babies with a lower chance of survival. A growing body of research is linking racism-related stress and chronic worry about racial discrimination with Black-White ***12** disparities. The U.S. has a legacy of reproductive oppression which may cause some women to delay getting care. And unconscious bias may also play an important role.

Birth Outcome Disparities Among Black Women, Planned Parenthood of the Pacific Southwest, Inc., Blog (Mar. 2, 2018, 11:04 PM), https://www.plannedparenthood.org/planned-parenthood-pacific-southwest/ blog/birth-outcome-disparities-among-black-women.

In Planned Parenthoods's narrative, abortion is always described as part of the *solution* to these disparities - not part of the problem. *See id.* (recommending "reproductive life planning and pre-conception care services offered at [Planned Parenthood]" as part of the path "to better birth outcomes for Black women"); *see also* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture,* 11 Guttmacher Policy Review 3, Aug. 6, 2008, *available at* https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture. Abortion advocates never acknowledge that the correlation of the concentration of abortion clinics near minority communities with *increasing* unintended pregnancy and abortion *in those same communities* suggests at least that "reproductive life planning" services are not *improving* outcomes for minority women.

In fact, the correlation between increased access to abortion services and poorer health outcomes suggests that the abortion industry is harming those women. Despite the barriers to collecting data about abortion, scientists are increasingly able to document ***13** connections between abortion and the negative health outcomes that afflict minority communities. *See, e.g.,* Brent Rooney et al., *Does Induced Abortion Account for Racial Disparity in Preterm Births, and Violate the Nuremberg Code?,* J. Am. Phys. & Surgeons, Winter 2008, at 102, *available at* http://www.jpands.org/vol13no4/ rooney.pdf (documenting a link between preterm birth and prior induced abortion). Occasionally, extreme instances of such outcomes even appear in the media. *See, e.g.,* Rosemary Parker, *Dead woman's ultrasound showed clot, problems after abortion, records show,* MichiganLive, Apr. 13, 2017, https://www.mlive.com/news/kalamazoo/index.ssf/2017/04/ dead_womans_ultrasound_showed.html (documenting the death of a young black woman after an abortion at Planned Parenthood); Matthew Hay Brown, *Abortion opponents want tighter regulations,* The Baltimore Sun, Mar. 2, 2011, https://www.baltimoresun.com/ bs-mtblog-2011-03-abortion_opponents_want_tighte-story.html (reporting tragic outcomes after abortion, including the death of a young black woman).

Perhaps it is unsurprising that abortion advocates deny that racial bias could infect the abortion industry, but there is no objective reason to doubt that racial bias exists at least as much in that industry as it does everywhere else. Just like other medical treatments, the available data confirm that the racial disparities in the incidence of abortion are not reducible to socioeconomic disparities. There are roughly twice as many poor white women in the United States as there are poor black women, and yet poor black women account ***14** for more of the nation's abortions (14.1%) than poor white women do (11.7%).*See* Rachel K. Jones & Megan L. Kavanaugh, *Changes in Abortion Rates Between 2000 and 2008 and Lifetime Incidence of Abortion,* 117 Obst. & Gyn. 1358-66 (June 2001). Thus, poverty can't be the whole story. Disparities in access cannot be a sufficient explanation either, since Planned Parenthood has made its services even more available to minority populations than to disadvantaged members of other groups, and its efforts have not slowed the increasing rate of minority abortions.

It is widely acknowledged that - consciously or unconsciously - the medical community treats minority patients differently than it treats similarly-situated white patients. There is no reason to believe that there is any *less* racism at work in the abortion context. Moreover, considering the abortion industry's history as an explicitly racist social movement, its unapologetic targeting of minority communities even to this day, and the increasingly poor health outcomes of the communities it claims to serve, there is every reason to believe that racism plays a profound role in the delivery of abortion services. *See* TooManyAborted.com, *The Negro Project,* http://www.toomanyaborted.com/thenegroproject/ (last visited Nov. 13, 2018) (noting the continuing effects of Margaret Sanger's "Negro Project" on today's black communities); Tanya L. Green, *The Negro Project: Margaret Sanger's EUGENIC Plan for Black America,* BlackGenocide.org, http://www.blackgenocide.org/archived_articles/negro.html (last visited Nov. 13, ***15** 2018) (describing the Negro Project and its unfortunate ongoing legacy).

II. Sex-Selection Abortions are a Reality in the United States.

Abortions for the purpose of eliminating a baby of an undesired sex occur frequently in the United States. Because women seeking abortions are not routinely required to declare their motivation, there are no statistics showing precisely how often sex selection is a motive, or the only motive, in seeking an abortion. *See* Sujatha Jesudason & Susannah Baruch, *Sex Selection: What Role for Providers,* 86 Contraception 6, 597 (2012), *available at* https://www.contraceptionjournal.org/article/S0010-7824(12)00796-2/pdf (acknowledging lack of "official data on the frequency of pre- or during-pregnancy sex selection," but provider experience and media coverage indicating it is a common practice). But data from the few groups with a known single-gender preference, widespread acceptance of other types of sex-selective reproductive technology, and mainstream defense of the right to sex-selective abortion all demonstrate that sex-selective abortion is a reality in the United States.

A. Available statistics reflect widespread use of sex-selective abortion.

Sex-selective abortion is not typically detectible in birth rate statistics because it can be used to eliminate either sex, but where a cultural group has a ***16** single-gender preference, the results of sex-selection abortion can be seen in altered sex ratios at birth (SRBs). Studies of data from the "Asian-Pacific" population, which is characterized by "son-preference," from the 2000 census revealed "[n]aturally impossible SRBs within particular ethnic groups. ..." Nicholas Eberstadt, *The Global War Against Baby Girls,* The New Atlantis, Fall 2011, *available at* https://www.thenewatlantis.com/publications/ the-global-war-against-baby-girls. In other words, the sex-ratios at birth of the children of Americans of Asian-Pacific origin were skewed so far from what is naturally possible that the use of sex-selection to avoid the birth of daughters is undeniable. Moreover, the sex-ratios at birth became more sharply distorted among babies later in birth-order, which "strongly suggest[s] that sex-selective abortions were the driver." *Id.;* Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data,* 1 Am. Econ. J.: Applied Econ. 2, 1, 3, 7, 15, 25-26 (2009), *available at* https://pdfs.semanticscholar.org/ 8f71/b2fb8f1184351113414f5d4201e02fb70e95.pdf (concluding that Chinese and Indian parents were more likely to have a son at their third and fourth births than the other ethnic groups that were studied); Kelsey Harkness, *Sex Selection Abortions are Rife in the U.S.,* Newsweek, Apr. 14, 2016, *available at* https://www.newsweek.com/sex-selection-abortion-rife-us-447403; *see also* Sunita Puri et al., *"There Is Such a Thing as Too Many Daughters, but Not Too Many Sons": A Qualitative Study of Son Preference and Fetal Sex Selection Among Indian Immigrants in the United States,* 72 Soc. Sci. & Med. 1169 (2011) (study of 65 Indian ***17** immigrant women "found that 40% of the women interviewed had terminated prior pregnancies with female fetuses and that 89% of women carrying female fetuses in their current pregnancy pursued an abortion").

Although statistics can only reflect the practice when there is a single gender preference, there is no reason to believe that only women in cultures with a "son-preference" have availed themselves of sex-selective abortion in the United States. Medical providers in the United States often cater to the preferences of prospective parents to achieve a certain "family balance" in terms of number and gender of children. Jesudason & Baruch, *supra,* at 597 (elaborating on "family balancing" as a motive for sex selection). This "family balancing" motivation for sex-selective abortions exists wherever pre-natal diagnosis and abortion are both available, and its prevalence is evident in the lucrative "reproductive technology" industry.

B. Americans freely make use of reproductive technologies for the purpose of selecting a child of a particular sex.

Although abortions for the purpose of sex-selection are not susceptible to data tracking, it is well established that Americans embrace several other reproductive technologies for the purpose of choosing a future baby's sex, including one that, like abortion, ends the lives of one's own already-conceived genetic offspring. A lucrative industry has developed around ***18** offering prospective parents the ability to select their baby's gender via pre-implantation genetic diagnosis ("PGD"). Jasmeet Sidhu, *How to Buy a Daughter: Choosing the sex of your baby has become a multi-million-dollar industry,* Slate.com, Sept. 14, 2012, *available at* http://www.slate.com/articles/health_and_science/medical_examiner/2012/09/sex_selection_in_babies_through_pgd_americans_are_paying_to_have_daughters_rather_than_sons_.html ("Gender selection now rakes in revenues of at least $100 million every year.").

PGD refers to the testing of embryos generated by in vitro fertilization for particular traits. *Id.* Once the embryos are sorted by trait, parents may choose which to implant in a women's uterus in order to bear a baby with the desired characteristic. PGD is used throughout the world for diagnostic purposes, but the United States is one of the only countries in which PGD is legal for non-medical reasons such as sex-selection. *Id.* ("It is illegal for use for nonmedical reasons in Canada, the U.K., and Australia."); Michelle J. Bayefsky, *Comparative preimplantation genetic diagnosis policy in Europe and the USA and its implications for reproductive tourism,* 3 Reprod. Biomedicine & Soc. Online 41 (2016) ("The USA stands apart in its laissez-faire approach towards the use of PGD."). Accordingly, the United States has become a destination for "medical tourism" in this area.

A 2004 study found that 40% of Americans had no concern about PGD as a means of selecting the gender of future children. Genetics & Public Policy Center, ***19** Reproductive Genetic Testing: What America Thinks 11 (2004), *available at* https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/976/ReproGenTestAmericaThinks.pdf?sequence=1&isAllowed=y. "A 2006 survey by Johns Hopkins University found that 42 percent of fertility clinics offered PGD for gender selection. ... [And] that was ... before many clinics undertook aggressive online marketing campaigns to drive the demand." Sidhu, *supra; see also* Bayefsky, *supra* ("Elective sex selection is reported to account for 9% of PGD uses in the USA."). PGD is popular with women because unwanted embryos are destroyed prior to implantation in the uterus, which avoids the need for a physically and emotionally taxing abortion. However, PGD is by no means easy: it involves medical procedures to harvest eggs and implant embryos; it is extremely costly; and it does not always yield viable embryos. *See, e.g.,* Sidhu, *supra.*

A less invasive and less costly method of trying to pre-select a baby's sex is "sperm sorting," which involves centrifugally sorting a sperm sample by weight into groups of sperm that are more or less likely to include a Y chromosome, then using a preferred group of sperm for IVF or artificial insemination. World Health Org. Genomic Resource Ctr., *Gender and Genetics: Genetic Technologies for Sex-Selection, Prefertilization,* http://www.who.int/genomics/gender/en/index4.html (last visited Nov. 13, 2018). This method of gender selection is far less invasive than PGD and far less expensive, but it is also far less reliable, with success rates of only 75 to 85%. *Id.*

***20** Sperm sorting is widely available in the United States, but at $1500 per attempt, it is still out of reach to most prospective parents, and, in up to 25% of cases, it yields an unwanted child of the opposite sex. *See id.*; *see also, e.g.,* Sidhu, *supra* (detailing the history of a mother who tried sperm sorting to achieve a female child, conceived a male she considered aborting, then went into debt for two rounds of IVF and PGD).

The demand within the United States for procedures such as PGD and sperm-sorting evidences a societal embrace of using reproductive technology for sex-selection. A culture in which the wealthy are engaging in PGD and sperm-sorting undoubtedly includes many who are pursuing the same result through the less costly means of sex-selective abortion.

C. Unlike most of the world, American abortion activists defend the choice to abort a fetus because of a preference for the other sex.

Fearing any narrowing of a woman's right to choose abortion, abortion proponents in the United States and the United Kingdom openly call for protecting the right to abort because of a preference for one sex or another: "If the U.S. Supreme Court thinks sex selection is sexist, more states will begin to chip away at a woman's reasons for terminating her pregnancy." Sital Kalantry, *Challenging the Narrative on Sex-Selective Abortion Bans,* Ms. Magazine Blog (Aug. 25, 2017). They recognize the inconsistency between ***21** viewing abortion as an absolute right and prohibiting certain reasons for choosing abortion: "Banning sex-selective abortion opens up a world in which there is such thing as a "good" and "bad" reason for an abortion." Pam Lowe, *Why I oppose a ban on sex-selection abortion,* The Conversation, Jan. 26, 2015, http://theconversation.com/why-i-oppose-a-ban-on-sex-selection-abortion-36684. "What could stop a state from banning abortions for reasons the majority regards as "trivial," such as wanting to complete one's education or be successful in a career?" Bonnie Steinbock, *Preventing Sex-Selective Abortions in America: A Solution in Search of a Problem,* The Hastings Center, Apr. 4, 2017, https://www.thehastingscenter.org/ preventing-sex-selective-abortions-america-solution-search-problem/.

Thus, faced with legislation prohibiting sex discrimination by means of sex-selective abortion, even civil rights activists condemn such legislation as a "burden on women obtaining abortions that they want for whatever reason." Kelly P. Kissell, *Arkansas considers banning 'sex-selection' abortions,* APnews.com, Feb. 9, 2017, https://apnews.com/c4c4d2f92b634a8f8e9d31 1b4c385fa9 (quoting Rita Sklar, executive director of Arkansas ACLU). "Once again, the call for government intervention to prevent sex selective abortion conflicts with the preservation of reproductive rights." Daniel Goodkind, Sex-Selective Abortion, Reproductive Rights and the Greater Locus of Gender Discrimination in Family Formation: Cairo's Unresolved Questions 16 (1997), *available at* https://www.psc.isr.umich.edu/pubs/pdf/rr97-383.pdf. "[E]ven the most ***22** terrible reason for having an abortion holds more sway than the best imaginable reason for compelling a woman to carry to term." Sarah Ditum, *Why Women Have a Right to Sex-Selective Abortion,* The Guardian, Sep. 19, 2013, https://www.theguardian.com/commentis free/2013/sep/19/sex-selective-abortion-womans-right.

Given public support for using reproductive technology to choose the gender of born children, as well as cultural defense of sex-selective abortion, and data from son-preferring ethnic groups, it is impossible to deny that abortions for the purpose of sex-selection are routinely being performed in the United States.

III. Abortion for the Purpose of Eliminating a Disabled Person is Commonplace in the United States.

A 2012 study of Down syndrome terminations in the United States demonstrates that prospective parents choose to terminate approximately 67% of fetuses diagnosed prenatally with Down syndrome. J.L. Natoli et al., *Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995-2011),* 32 Prenatal Diagnosis 142 (2012), *available at* https://www.ncbi.nlm.nih.gov/pubmed/22418958. The number of births of people with Down syndrome in the United States is therefore 30% below natural rates. Gert de Graaf et al., *Estimates of the live births, natural losses, and elective terminations with Down syndrome in the United States,* 167A Am. J. Med. Genetics 756 (2015).

***23** These numbers do not rival the decimation in Down syndrome populations in places like Iceland, where only one or two babies are born with Down syndrome per year, or Denmark, where only four prenatally diagnosed Down syndrome babies were born in 2016. Jerome Lejeune Foundation, *All Danish babies with Down syndrome aborted but 4 in 2016,* Dec. 22, 2017, https://lejeunefoundation.org/denmark-downsyndrome-abortion/. However, the United States' termination rate is sufficient to raise concern, particularly given that Down syndrome is the most common and among the least debilitating of the disorders that can be diagnosed prenatally. Lindsay Abrams, *Prenatal Testing: Earlier and More Accurate Than Ever,* The Atlantic, Nov. 5, 2012, *available at* http://www.theatlantic.com/health/archive/2012/11/ prenatal-testing-earlier-and-more-accurate-than-ever/264472/2/. People with Down syndrome can live lives of ordinary length and function well enough to live independently and be employed. National Down Syndrome Society, *Down Syndrome Facts,* https://www.ndss.org/about-down-

syndrome/down-syndrome-facts/ (last visited Nov. 13, 2018). Though less thoroughly documented, fetuses diagnosed with more debilitating disorders are undoubtedly aborted at higher rates even than 67%. *See, e.g.,* I.C. Lakovschek et al., *Natural outcome of trisomy 13, trisomy 18, and triploidy after prenatal diagnosis,* 155A Am. J. Med. Genetics 2626 (2011) (studying a population of prenatally diagnosed fetuses with triploidy, trisomy 13, and trisomy 18, and finding that 78% of cases were terminated, so only 22% remained for a study of "natural outcomes").

***24** Government has myriad legitimate interests in preventing the termination of disabled fetuses. Disability rights activists argue that aborting a fetus on the basis of disability is the vilest form of disability discrimination, victimizing the disabled "at their most vulnerable stage." Grazie Pozo Christie, *Eugenics and Equality Can't Mix: Aborting babies with detected disabilities is incompatible with equality,* U.S. News & World Report, Aug. 26, 2016, *available at* https://www.usnews.com/opinion/articles/2016-08-26/ eugenic-abortion-is-a-challenge-to-equality-for-people-with-disabilities. In addition to moral concerns, a high rate of terminations raises practical concerns for the future diversity of the United States, because the practice of eliminating disabled people may become self-perpetuating: more terminations of disabled fetuses "could in turn result in increased social pressure to terminate, particularly if the diagnosed conditions were to become rarer in society resulting in a decline of support services (e.g. respite care homes for Down's [sic] Syndrome families). In practice, it could become increasingly difficult for a patient who has received a positive test result not to 'choose' to abort." Caroline Wright, PHG Foundation, Cell-free fetal nucleic acids for non-invasive prenatal diagnosis: report of the uk expert working group 17 (2009), *available at* http://www.phgfoundation.org/documents/214_1260287360.pdf. Moreover, eliminating most people with disabilities raises grave concerns for the lives of those who do live with disabilities. In addition to dwindling support for their unique challenges, increasing rarity and the sense of ***25** disability being "avoidable" is likely to increase the stigma associated with disability. *Id.* at 29.

IV. Eugenic Abortions are Likely to Become More Common in the U.S. As Non-Invasive Prenatal Diagnostic Tools are Increasingly Available and Increasingly Sophisticated.

Compounding the timeless objections to determining which humans will be born based on traits like sex and disability is the strong likelihood that the practice of trait-selective abortion is going to grow exponentially in frequency because of the widespread use of non-invasive prenatal diagnostic ("NIPD") technology. *See* Erin Biba, *This Simple Blood Test Reveals Birth Defects - And the Future of Pregnancy,* Wired Magazine, XX/XX/2012, https://www.wired.com/2012/12/ff-prenatal-testing/; Henry T. Greely, *Get Ready for the Flood of Fetal Gene Screening,* 469 Nature 289, 289 (2011). In the past several years, new NIPD tests have become available, both through providers and over-the-counter, that indicate very early in pregnancy the various genetic features of babies, including sex and disability status. *See, e.g.,* Abrams, *supra;* Carolyn Y. Johnson, *DNA Blood Test Can Detect Prenatal Problems,* Boston Globe, Feb. 26, 2014, *available at* http://www.bostonglobe.com/lifestyle/health-wellness/2014/02/26/ new-study-suggests-prenatal-genetic-tests-could-offered-all-pregnant-women/ V1GQuRL4jkr1M60e1XcQCK/story.html.

***26** The new tests, which evaluate fetal DNA present in the mother's blood, have three major advantages over past methods of prenatal testing: (1) they are noninvasive of the uterus because they require only a maternal blood test, (2) they are increasingly inexpensive as the technology becomes more widespread, and (3) they are accurate very early in pregnancy. Jaime S. King, And *Genetic Testing for All ... The Coming Revolution in Non-Invasive Prenatal Genetic Testing,* 42 Rutgers L. J. 599, 616 (2011). As a result of all of these features, medical and social commentators agree that the incidence of trait-selective abortion is likely to greatly increase in the coming years. *See, e.g.,* Wright, *supra,* at 19 ("The major ethical concern in this area is therefore that prenatal fetal sex determination, in combination with termination of pregnancy, could result in sex selection for non-medical or 'trivial' reasons, which could have major implications for society."); Michael Stokes Paulsen, *It's a Girl,* Public Discourse, Oct. 24, 2011, https://www.thepublicdiscourse.com/ 2011/10/4149/ ("Watch for a spike in abortion rates over the next few years as parents find it easier and cheaper to 'choose' to have a boy by killing the fetus if ... it's a girl").

V. Anti-Discrimination Laws Like HEA 1337 are a Reasonable Legislative Response to Odious Social Practices.

The Court should grant certiorari in order to vindicate states' rights to pass sensible legislation designed to address the troubling phenomenon of ***27** discrimination based on race, gender, and disability in the abortion context. The State of Indiana undeniably has a legitimate interest in trying to end discrimination against racial minorities, the female sex, and disabled persons. There is ample evidence, from this country and others, to support the enactment of legislative prohibitions as one strategy for combating such invidious discrimination.

For example, although racial discrimination in medicine is a complicated issue that defies simple solution, the Institute of Medicine recommended enforcement of anti-discrimination laws as one strategy for addressing it. *See* IOM, *supra,* at 187-88. There is no reason to think that enforcing a prohibition on racial discrimination in the abortion industry would contribute any less to ameliorating the gross racial disparities in that setting.

Meanwhile, as noted above, many countries prohibit sex discrimination in the context of other reproductive technologies. *See supra* Section II.B. Some countries also prohibit sex-selective abortion,[3] while ***28** others are considering banning it.[4] And as Petitioners have pointed out, many other States have already enacted laws banning abortions on the basis of race, gender, or disability. *See* Pet. for Cert, at 25.[5]

3 *See, e.g.,* Chinadaily.com, *China bans selective abortion to fix imbalance,* July 16, 2004, http://www.chinadaily.com.cn/ english/ doc/2004-07/16/content_349051.htm; Arindam Nandi & Anil Deolalikar, *Does a legal ban on sex-selective abortions improve child sex ratios? Evidence from a policy change in India,* 103 J. of Devel. Econ. 216 (2013) (arguing that India's ban on sex-selective abortions has had a positive impact on that country's gender imbalance), *available at* https://econpapers.repec.org/article/ eeedeveco/ v_3a103_3ay_3a2013_3ai_3ac_3ap_3a216-228.htm.

4 *See, e.g.,* Adam Forrest, *Early Gender tests 'leading to selective abortions of girls in UK',* Independent, Sept. 17, 2018, https:// www.independent.co.uk/news/health/ selective-abortions-gender-tests-girls-uk-labour-a8540851.html (discussing a movement in the UK to ban sex-selective abortion).

5 Eight state laws outlawing sex-selective abortion: Ariz. Rev. Stat. Ann. § 13-3603.02; Ark. Code Ann. § 20-16-1904 (eff. Jan. 1, 2018); Kan. Stat. Ann. § 65-6726; N.C. Gen. Stat. § 90-21.121; N.D. Cent. Code § 14-02.1-04.1; Okla. Stat. tit. 63, § 1-731.2; 18 Pa. Cons. Stat. § 3204; S.D. Codified Laws § 34-23A-64. One state law banning abortions on the basis of race: Ariz. Rev. Stat. Ann. § 13-3603.02. Three state laws banning abortions on the basis of genetic abnormality: La. Rev. Stat. Ann. §40:1061.1.2; N.D. Cent. Code §14-02.1-04.1; Ohio Rev. Code Ann. § 2919.10.

Banning abortions on the basis of race, gender, and disability is a prudent - even laudable - step for a legislature seeking to deter increasingly widespread eugenic practices that devalue and disadvantage the most vulnerable members of society. This Court should not permit the Seventh Circuit decision invalidating such a ban to stand.

***29 CONCLUSION**

The Supreme Court should grant certiorari in this case in order to reverse the Seventh Circuit and affirm that States may prohibit abortion based on a baby's race, gender, or disability.

Respectfully submitted,

Thomas L. Brejcha

Counsel of Record

Sarah E. Pitlyk

Stephen M. Crampton

Thomas More Society

309 W. Washington Street, Suite 1250

Chicago, Illinois 60606

(312) 782-1680

tbrejcha@thomasmoresociety.org

Counsel for Amici Curiae, The Restoration Project; Pastor Joseph Parker, pastor of Greater Turner Chapel AM.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society

November 15, 2018

End of Document

Senator Dick Durbin
Written Questions for Sarah Pitlyk
October 2, 2019

For questions with subparts, please answer each subpart separately.

Questions for Sarah Pitlyk

1. In your July 3, 2018 *National Review* article entitled "Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism," you described the Supreme Court's *NFIB v. Sebelius* decision upholding the Affordable Care Act as an "unprincipled decision."

a. Why did you say this?

The op-ed from which this excerpt is taken was published before then-Judge Kavanaugh was nominated to the Supreme Court, in response to certain specific criticisms that had been leveled at his judicial record. As a former clerk, I was more familiar than most with that record, and I wanted to support Judge Kavanaugh, so I published an op-ed explaining his opinions in relevant cases.

One of the criticisms to which I was responding related to the Supreme Court's decision in *NFIB v. Sebelius*, the outcome of which many commentators have suggested was at least partially determined by political considerations rather than jurisprudential principles. That is the perception I was referring to in this quote.

b. What in your view would a principled decision have done?

I wrote that op-ed as a former clerk supporting her mentor's nomination to the Supreme Court. As a judge I would never be in the position of supporting (or opposing) any judicial nominee, and certainly not of responding the concerns of any particular political constituency. On the contrary, my role as a judge will be to apply all applicable precedent without regard for the preferences of any person or group. *See* Canon 5, Code of Conduct for United States Judges.

Because of that different role, as a judicial nominee, it would be improper for me to grade any decision of the United States Supreme Court. If I am fortunate enough to be confirmed, I will apply them all fully and faithfully. *See* Canons 1 and 3, Code of Conduct for United States Judges; *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

Nomination of Sarah E. Pitlyk
to the United States District Court for the Eastern District of Missouri
Questions for the Record
Submitted October 2, 2019
QUESTIONS FROM SENATOR WHITEHOUSE

1. During your nomination hearing, Senator Blumenthal (D-CT) asked whether you believe that contraceptives and abortifacients are analogous.

a. In your view, what is the difference between an abortifacient and a contraceptive?

My understanding of the terms is that an "abortifacient" is an agent that ends a pregnancy, whereas a "contraceptive" prevents pregnancy.

b. Do you believe that contraceptives cause abortions?

Again, my understanding is that a "contraceptive" is, by definition, something that prevents pregnancy. Therefore, I would not consider something that causes an abortion a "contraceptive."

c. How would you classify birth control pills, IUDs, and emergency contraceptives?

Not being a doctor or pharmacist, I would not presume to try to answer to this question, especially since each of these terms can be used to describe many different drugs or devices that may well have different mechanisms of action, and I can't be sure precisely which technologies you mean. But again, on my understanding of the terms, any technology that prevents pregnancy is a "contraceptive" and any that ends pregnancy is an "abortifacient."

2. In 2018, you filed an amicus brief in *Box v. Planned Parenthood of Indiana* on behalf of a number of anti-choice organizations. In this brief, you argued that the "abortion industry…target[s] ethnic minorities," and is harming low-income women in minority communities.

a. Please define the term "abortion industry."

As used in the amicus brief we drafted on behalf of African-American pro-life advocates in support of a statute banning abortions based on race, sex, and disability, the term "abortion industry" is just a collective term for entities that provide abortions. It would encompass those entities that would be eligible for membership in the National Abortion Federation, which describes itself as "the professional association of abortion providers." *See* https://prochoice.org/about-naf/.

b. Do you believe that access to reproductive healthcare disproportionately harms low-income women?

I have no personal knowledge on the basis of which to answer this. The argument I prepared on behalf of African-American advocates about the effects of situating abortion clinics in minority neighborhoods on health outcomes is attached hereto.

c. What evidence in the record of that case supported your argument that abortion providers "target" certain ethnic minorities?

Our clients, who offered their perspective to the Court as amici curiae, made an argument based on census, geographic, and revenue data. The amicus brief, attached hereto, provides the primary sources upon which my clients relied in their argument.

d. Do you believe that access to reproductive healthcare disproportionately harms women of color?

Please see my response to Question 2.b.

3. During your nomination hearing, Senator Blumenthal (D-CT) asked how you would ensure that a litigant seeking an abortion could trust your impartiality in light of your extensive anti-choice advocacy.

a. Do you believe that a woman's right to choose is a fundamental right?

The Supreme Court has recognized such a right in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed I would faithfully apply all binding Supreme Court precedent, including *Roe v. Wade* and *Planned Parenthood v. Casey*.

b. Do you believe that *Roe v. Wade* is settled law?

The Supreme Court has reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973) in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and other cases. If confirmed, I would faithfully apply Supreme Court and Eighth Circuit precedents on this issue.

c. Do you believe that *Planned Parenthood v. Casey* is settled law?

The Supreme Court has reaffirmed *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), and other cases. If confirmed, I would faithfully apply Supreme Court and Eighth Circuit precedents on this issue.

d. Do you believe that *Whole Women's Health v. Hellerstedt* is settled law?

Whole Woman's Health v. Hellerstedt is a precedent of the U.S. Supreme Court. If confirmed, I would faithfully apply Supreme Court and Second Circuit precedents.

4. Given your demonstrated commitment to advocating for pro-life positions, will you commit to recuse yourself from cases involving abortion and related issues?

I will apply every decision of the United States Supreme Court and the United States Court of Appeals for the Eighth Circuit fully and faithfully, including every precedent relating to abortion. I fully comprehend the difference between the role of an advocate and the role of a judge, and—if I am confirmed—I will take my oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" very seriously. 28 U.S.C. § 453.

Because every recusal decision is fact-specific, I don't think it is possible assess the issue hypothetically, but I will recuse from any case in which my impartiality "might reasonably be questioned," as required by 28 U.S.C. § 455(a), and in any of the circumstances specifically prescribed by 28 U.S.C. § 455(b). In response to any party's concern about my impartiality, I will carefully consult all relevant rules and precedents, and I will confer with both parties, with my chief judge and colleagues, and, as necessary, with the ethics specialists at the Administrative Office for the U.S. Courts.

5. Your questionnaire indicates that you have been a member of the Federalist Society for Law and Public Policy since 2006.

a. What has your level of involvement with the Federalist Society been over the last 13 years?

I attended Federalist Society events during law school and served as communications chair for the Yale Law School chapter for one year. I believe I attended their national law student conference once when I was in law school. Since law school, I have occasionally attended events sponsored by the Federalist Society. I attended the National Lawyer's Conference either once or twice when I lived in Washington, DC, prior to 2012, and then again in 2018. As set forth in my Senate Judiciary Questionnaire, I spoke to a number of Federalist Society chapters during the confirmation process for Justice Kavanaugh.

b. If confirmed, do you plan to remain an active participant in the Federalist Society?

I have not had the occasion to make plans for future activities in the event I were to be confirmed. In activities I undertake after confirmation, I would be guided by the Code of Conduct for United States Judges and would consult with ethics specialists at the Administrative Office of U.S. Courts for their advice.

c. If confirmed, do you plan to donate money to the Federalist Society?

Please see my response to question 5.b.

d. Have you had contacts with representatives of the Federalist Society in preparation for your confirmation hearing? Please specify.

No.

6. A Washington Post report from May 21, 2019 ("A conservative activist's behind-the-scenes campaign to remake the nation's courts") documented that Federalist Society Executive Vice President Leonard Leo raised $250 million, much of it contributed anonymously, to influence the selection and confirmation of judges to the U.S. Supreme Court, lower federal courts, and state courts. If you haven't already read that story and listened to recording of Mr. Leo published by the Washington Post, I request that you do so in order to fully respond to the following questions.

a. Have you read the Washington Post story and listened to the associated recordings of Mr. Leo?

I have reviewed the article in response to this request.

b. Do you believe that anonymous or opaque spending related to judicial nominations of the sort described in that story risk corrupting the integrity of the federal judiciary? Please explain your answer.

As a nominee for judicial office, it would be inappropriate for me to comment on the political aspects of the confirmation process. *See* Canon 5, Code of Conduct for United States Judges; *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

c. Mr. Leo was recorded as saying: "We're going to have to understand that judicial confirmations these days are more like political campaigns." Is that a view you share? Do you believe that the judicial selection process would benefit from the same kinds of spending disclosures that are required for spending on federal elections? If not, why not?

Please see my answer to question 6.b.

d. Do you have any knowledge of Leonard Leo, the Federalist Society, or any of the entities identified in that story taking a position on, or otherwise advocating for or against, your judicial nomination? If you do, please describe the circumstances of that advocacy.

I do not have any such knowledge.

e. As part of this story, the Washington Post published an audio recording of Leonard Leo stating that he believes we "stand at the threshold of an exciting moment" marked by a "newfound embrace of limited constitutional government in our country

[that hasn't happened] since before the New Deal." Do you share the beliefs espoused by Mr. Leo in that recording?

Please see my answer to question 6.b.

7. During his confirmation hearing, Chief Justice Roberts likened the judicial role to that of a baseball umpire, saying "'[m]y job is to call balls and strikes and not to pitch or bat."

a. Do you agree with Justice Roberts' metaphor? Why or why not?

I agree that the job of a judge is to apply legal principles fairly to the facts in a particular case, without regard for the outcome.

b. What role, if any, should the practical consequences of a particular ruling play in a judge's rendering of a decision?

In general, it is not the role of the judge to consider practical consequences. The Supreme Court has said that judges should consider practical consequences in some circumstances, however, such as when considering whether to grant a preliminary injunction. *See, e.g.*, *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008).

8. Federal Rule of Civil Procedure 56 provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact" in a case. Do you agree that determining whether there is a "genuine dispute as to any material fact" in a case requires a trial judge to make a subjective determination?

A dispute about a material fact is "genuine" if a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). This test requires a judge to undertake an objective determination. The "judge's function is not himself to weigh the evidence and determine the truth of the matter" but to decide whether an issue must be resolved by a finder of fact because it could reasonably be resolved in favor of either party. *Id.* at 249.

9. During Justice Sotomayor's confirmation proceedings, President Obama expressed his view that a judge benefits from having a sense of empathy, for instance "to recognize what it's like to be a young teenage mom, the empathy to understand what it's like to be poor or African-American or gay or disabled or old."

a. What role, if any, should empathy play in a judge's decision-making process?

Congress has specifically required all federal judges to swear that they "will administer justice without respect to persons, and do equal right to the poor and to the rich." 28 U.S.C. § 453. Nevertheless, understanding a litigant's particular background may be relevant to adjudicating specific issues. For example, at sentencing, a judge must consider "the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).

b. What role, if any, should a judge's personal life experience play in his or her decision-making process?

The outcome of a particular case should never turn on the identity or personal experience of the judge.

10. In your view, is it ever appropriate for a judge to ignore, disregard, refuse to implement, or issue an order that is contrary to an order from a superior court?

No.

11. The Seventh Amendment ensures the right to a jury "in suits at common law."

a. What role does the jury play in our constitutional system?

The Constitution discusses rights related to juries in the Fifth, Sixth, and Seventh Amendments. These rights include the right of criminal defendants to trial by an impartial jury, the right not to be tried for a capital crime except on indictment from a grand jury, and the right to a jury trial in civil cases. As the Supreme Court has noted, jury service "preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people." *Powers v. Ohio*, 499 U.S. 400, 407 (1991).

b. Should the Seventh Amendment be a concern to judges when adjudicating issues related to the enforceability of mandatory pre-dispute arbitration clauses?

Questions concerning the enforceability of mandatory pre-dispute arbitration clauses are the subject of ongoing litigation. *See* Canon 5, Code of Conduct for United States Judges. If confirmed, I would faithfully apply all provisions of the U.S. Constitution, including the Seventh Amendment, as well as all relevant Supreme Court and Second Circuit precedent on the Seventh Amendment and arbitration clauses.

c. Should an individual's Seventh Amendment rights be a concern to judges when adjudicating issues surrounding the scope and application of the Federal Arbitration Act?

Please see my answer to Question 11.b.

12. What deference do congressional fact-findings merit when they support legislation expanding or limiting individual rights?

The Supreme Court has said that courts "must review legislative 'factfinding under a deferential standard'" but "must not 'place dispositive weight' on those 'findings.'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2310 (2016). If I were to be confirmed, I would faithfully apply Supreme Court and Eighth Circuit precedent regarding deference to congressional fact-finding.

13. The Federal Judiciary's Committee on the Codes of Conduct recently issued "Advisory Opinion 116: Participation in Educational Seminars Sponsored by Research Institutes, Think Tanks, Associations, Public Interest Groups, or Other Organizations Engaged in Public Policy Debates." I request that before you complete these questions you review that Advisory Opinion.

a. Have you read Advisory Opinion #116?

Yes.

b. Prior to participating in any educational seminars covered by that opinion will you commit to doing the following?

i. Determining whether the seminar or conference specifically targets judges or judicial employees.

ii. Determining whether the seminar is supported by private or otherwise anonymous sources.

iii. Determining whether any of the funding sources for the seminar are engaged in litigation or political advocacy.

iv. Determining whether the seminar targets a narrow audience of incoming or current judicial employees or judges.

v. Determining whether the seminar is viewpoint-specific training program that will only benefit a specific constituency, as opposed to the legal system as a whole.

If confirmed, I would faithfully discharge my duties under the Code of Judicial Conduct and all applicable federal laws. These requirements include the obligation to avoid impropriety and the appearance of impropriety. I would accordingly evaluate my participation in any activity for compliance with these requirements, in consultation with the ethics specialists at the Administrative Office of U.S. Courts.

c. Do you commit to not participate in any educational program that might cause a neutral observer to question whether the sponsoring organization is trying to gain influence with participating judges?

Please see my response to question 13.b.

2018 WL 6042850 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Kristina BOX, Commissioner of the Indiana State Department of Health, et al., Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., et al., Respondents.

No. 18-483.
November 15, 2018.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Brief of the Restoration Project; Pastor Joseph Parker, Pastor of Greater Turner Chapel A.M.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society as Amici Curiae in Support of Petitioners

Thomas L. Brejcha, Sarah E. Pitlyk, Stephen M. Crampton, Thomas More Society, 309 W. Washington Street, Suite 1250, Chicago, Illinois 60606, (312) 782-1680, tbrejcha@thomasmoresociety.org, for amici curiae The Restoration Project; Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society.

*i TABLE OF CONTENTS

*iii TABLE OF AUTHORITIES

Statutes

*1 INTEREST OF THE AMICI CURIAE [1]

[1] Counsel for Petitioners and Respondents received timely notice of amici curiae's intent to file this brief and counsel for Petitioners and Respondents have consented to its filing. Further, as required by Supreme Court Rule 37.6, counsel certifies this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than amici curiae, their members, or their counsel.

The Restoration Project ("TRP") is a non-profit organization dedicated to rebuilding families, promoting the sanctity of life, and providing related educational materials, in order to transform American public policy and culture's impact on Black life. TRP works with pastors, ministry leaders and organizations to restore a culture of uprightness, evenhandedness, and virtue.

Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church in Greenwood, MS, has served as a pastor of different congregations for a little more than 40 years. He has been working to stand up for life against abortion for more than 20 years and is disturbed by the abortion industry's deliberate targeting of the African American community.

Everlasting Light Ministries is a comprehensive post-abortion healing and marriage ministry that seeks to heal the massive devastation of abortion and marital discord in America and especially in communities of color; proclaim the truth about abortion and its real life consequences; and sensitize communities to the needs of all post-abortive, post-miscarriage people.

***2 Protect Life and Marriage** Texas works to uphold the Judeo-Christian ethic established by our Founding Fathers in our society with the view of securing liberty for marriages, the American family and the life of the unborn.

The Thomas More Society ("TMS") is a national public interest law firm devoted to restoring respect in the law for life, the family and religious liberty. Based in Chicago, TMS accomplishes its organizational mission through litigation, education, and related activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici The Restoration Project, Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church, Everlasting Light Ministries, Protect Life and Marriage Texas, and the Thomas More Society submit this brief to aid the Court in assessing the gravity of the problem Indiana's HEA 1337 and similar state statutes seek to address. Invidious discrimination in the provision of abortion services is an entrenched and escalating phenomenon. Babies of minority mothers are aborted at a far higher rate than their white counterparts - a disturbing trend that the abortion industry intentionally and unabashedly perpetuates. With recent advances in prenatal testing technology, abortions motivated by the unborn child's gender, disability, and *3 other disfavored genetic traits are also dramatically on the rise.

HEA 1337 and similar state laws are sensible and important legislative responses to racist, sexist, and eugenic practices performed under the guise of "reproductive rights." This Court should grant certiorari in order to reverse the Seventh Circuit and reinstate HEA 1337.

ARGUMENT

I. The Delivery of Abortion Services is Infected with Racial Bias.

A. The origins of abortion are racist and eugenic.

The eugenic origins of the birth-control movement - the progenitor of the abortion rights movement - are well-established. See, *e.g.*, Rebecca A. Messall, *Margaret Sanger and the Eugenics Movement,* Human Life Rev., Spring 2010, at 98 (noting that the founders and early leaders of what became Planned Parenthood were all members of the American Eugenics Society). Margaret Sanger, the founder of the birth control organization that became Planned Parenthood, wrote:

> [T]he example of the inferior classes, the fertility of the feeble-minded, the mentally defective, the poverty-stricken classes, should not be held up for emulation to the mentally and physically fit though less fertile parents of the educated and well-to-do classes. On the *4 contrary, **the most urgent problem today is how to limit and discourage the over-fertility of the mentally and physically defective.**

Margaret Sanger, *The Eugenic Value of Birth Control Propaganda,* Birth Control Rev., XX/XX/1921, at 5, available at https://www.nyu.edu/projects/sanger/web edition/app/documents/show.php?sangerDoc=238946.xml.

Scholars of the history of the eugenics movement acknowledge that Sanger "supported some eugenic aims, and was not above voicing her contempt for the poor, disabled and minorities." Paul A. Lombardo, *Symposium Article: Disability, Eugenics, and the Culture Wars,* 2 St. Louis U. J. Health L. & Pol'y 57, 76 (2008). They also acknowledge that in Planned Parenthood's early advocacy for birth control, "[t]he organization focused on unwanted children and pathological parenting in poor African American communities. ..." Mary Ziegler, 25 Yale J.L. & Feminism 1, 13 (2013); *see also Birth Control or Race Control? Sanger and the Negro Project,* Newsletter #28 (The Margaret Sanger Papers Project, New York University, New York, NY), Fall 2001 (conceding that "the patriarchal racism of the time ... dictated both the Federation's and Sanger's approach to blacks and birth control"), https://www.nyu.edu/projects/sanger/articles/bc_or_race_control.php. To early advocates of birth control and abortion, minority racial groups were among "the mentally and physically defective" whose fertility they sought to limit.

*5 B. The modern abortion industry continues to target ethnic minorities.

Modern advocates of abortion disavow the racism of Planned Parenthood's founders. *See, e.g.,* Now This News, Group Nine Media, Inc., Video: *The History of 100 Years of Women's Health Care at Planned Parenthood,* Jan. 17, 2017, https://www.youtube.com/watch?v=VqYspn7PZmQ (acknowledging that "there's no question that Margaret left behind a conflicting

legacy" but asserting that "*[r]acism and ableism do not have a place at Planned Parenthood and sure as [expletive] don't represent the organization's commitment to equality*").

Demographic data tell a different story. Minority babies in America are at far greater risk from abortion than white babies. In parts of this country, black babies are more likely to be aborted than they are to be born alive. *See, e.g.,* N.Y. State Dep't of Health, Table 23: Induced Abortion and Abortion Ratios by Race/ Ethnicity and Resident County New York State - 2013, Vital Statistics of N.Y. State 2013, *available at* https://www.health.ny.gov/statistics/vital_statistics/2013/table23.htm (noting that in New York City in 2013, 1180 black babies were aborted for every 1000 live births, compared to 240 white babies). In 2014, the rate of abortion among black women was 3.5 times the abortion rate among white women. *See* Tara C. Jatlaoui et al., *Ctrs. for Disease Control & Prevention, Abortion Surveillance - 2014, Morbidity and Mortality Weekly Report,* Vol. 66, No. 24 (Nov. 24, 2017), at 1-48, *available at* https://www.cdc.gov/mmwr/volumes/66/ss/ss6624a1. ***6** htm ("CDC"). In Indiana in 2017, 9.7% of the state population was black but black women had 30.6% of the state's abortions. *See* Indiana State Dep't of Health, Terminated Pregnancy Report 2017 10, *available at* https://www.in.gov/isdh/files/2017%20 Indiana%20Terminated %C20Pregnancy%20Report.pdf; United States Census Bureau, Quick Facts: Indiana, https://www.census.gov/quickfacts/in (last visited Nov. 8, 2018). The numbers are similarly grim for Hispanic babies. *See, e.g.,* N.Y. State Dep't of Health, *supra* (610 Hispanic babies were aborted per 1000 live births in New York City in 2013, compared to 240 white babies).

Abortion advocates contend that preexisting cultural and socioeconomic factors have caused these racial disparities. *See, e.g.,* Preterm, *A Commitment to Racial Justice* (2018), www.preterm.org/racial-justice ("Because of racial injustice, women of color are both more likely to need abortions, and less likely to be able to afford them. For us, reproductive justice includes racial justice."). By the industry's account, its provision of abortion in significantly higher rates to minority women than to white women is a beneficent response to the minority population's greater "need," rather than a function of anything that the abortion industry has done to inflate demand in the minority population. But these claims are belied by the industry's business and marketing practices.

A study based on 2010 Census data reveals that Planned Parenthood has located 79% of its surgical abortion centers within walking distance of ***7** minority-dense neighborhoods. *See* Susan W. Enouen, Life Issues Institute, *New Research Shows Planned Parenthood Targets Minority Neighborhoods,* Life Issues Connector (Oct. 2012), http://www.protectingblacklife.org/ pdf/PP-Targets-10-2012.pdf; *see also* Mark Crutcher et al., Life Dynamics Inc., *Racial Targeting and Population Control* 22, 2011, https://issues4life.org/pdfs/racial_targeting_population_control.pdf (reporting based on census-based study of family planning clinics that "there is not one state in the union without population control centers located in zip codes with higher percentages of blacks and/or Hispanics than the state's overall percentage"). [2]

2 Planned Parenthood tried to counter this analysis of the Census data with a Guttmacher Institute study allegedly finding that only a small percentage of Planned Parenthood clinics are located in "majority-black neighborhoods," but Guttmacher's study was carefully manipulated to produce a misleading result. *See* Willis L. Krumholz, *Yes, Planned Parenthood Targets and Hurts Poor Black Women,* The Federalist, Feb. 18, 2016, http://thefederalist.com/2016/02/18/ yes-planned-parenthood-targets-and-hurts-poor-black-women/ (explaining the defects in the Guttmacher data and its misinterpretation by defenders of Planned Parenthood).

Planned Parenthood claims that locating their clinics near minority communities is part of their outreach to those most in "need" of their services. *See, e.g.,* Hilary Cadigan, *Planned Parenthood moves to EAV,* Creative Loafing, June 16, 2017, https:// creativeloafing.com/content-266693-Planned-Parenthood-moves-to-EAV ("Rollins School of Public Health graduate students from Emory University conducted a relocation analysis to identify strategic locations for the Atlanta ***8** health center. The East Atlanta site is located in an area of need for our sexual and reproductive health services. ..."). But community health centers, which provide medical services to low-income patients, are not similarly concentrated in minority neighborhoods; they perceive needs for their services in other communities as well. *See* Charlotte Lozier Institute, *Maps: Health Clinics Nationwide Compared to Planned Parenthood Centers,* Aug. 21, 2015, https://lozierinstitute.org/health-clinics-nation wide-compared-to-planned-parenthood-centers/. Only a provider that receives the lion's share of its revenues as payment for abortions has made the deliberate strategic choice to locate its surgical abortion clinics near high-density minority communities. Willis L. Krumholz,

Planned Parenthood's Big Bad Business Model, The Federalist, Oct. 27, 2015, http://thefederalist.com/2015/10/27/ planned-parenthoods-big-bad-business-model/ ("revenue from abortion provides the highest profit margins, and is the biggest contributor to [Planned Parenthood] affiliates' total profit").

Since Planned Parenthood began to concentrate its abortion services intentionally in minority communities, the number of minority abortions has dramatically increased while the abortion rate among white women has declined. *See* Susan W. Enouen, Life Issues Institute, *More Evidence Planned Parenthood Markets Abortion to Minorities,* June 14, 2016, https:// www.lifeissues.org/2016/06/pp-markets-abortion-minorities/ ("[F]rom 1990 to 2008, before and after Planned Parenthood's reinvention, the percentage of abortions ***9** received by Black women increased by 9.0%; for Hispanic women it rose 7.6% while the percentage of abortions received by white women declined by 11.1%."). Not coincidentally, during the same interval, Planned Parenthood's revenues have skyrocketed. *See* Willis L. Krumholz, *Guttmacher Erases Data To Protect Planned Parenthood, IUDs,* The Federalist, Apr. 12, 2016, http://thefederalist.com/2016/04/12/ guttmacher-erases-data-to-protect-planned-parenthood-iuds/ (exposing the Guttmacher Institute's manipulation of data to mask the fact that Planned Parenthood had increased its profits by altering its business model in such a way as to bring about a dramatic increase in minority abortion rates).

In addition to deliberately situating their abortion clinics close to minority communities, Planned Parenthood also makes a concerted marketing effort to encourage such communities to avail themselves of its abortion services. For example, Planned Parenthood's "Black Community" Twitter feed makes public statements encouraging black women to support and patronize Planned Parenthood, such as: "If you're a Black woman in America, it's statistically safer to have an abortion than to carry a pregnancy to term or give birth." @PPBlackComm, Twitter, XX/XX/2017, 8:13 AM, https://twitter.com/ppblackcomm/ status/9253803 07242582016?lang=en.

Given its strategic location of abortion clinics near minority neighborhoods and its blatant marketing of abortion to the minority community, the abortion industry's claims to bear no responsibility for the ***10** staggering numbers of minority abortions beggars belief. *See* Crutcher et al., *supra* (noting that "these patterns are routinely considered indicative of racial targeting when it comes to other issues," such as when civil rights advocates criticize tobacco and alcohol companies for concentrating their retail and marketing efforts disproportionately in minority neighborhoods).

C. Socioeconomic factors alone do not explain the different treatment of racial minorities.

Abortion is not the only instance of the medical community treating minority patients differently from their white counterparts. In a 2002 study, the Institute of Medicine ("IOM") found that "[e]vidence of racial and ethnic disparities in healthcare is, with few exceptions, remarkably consistent across a range of illnesses and healthcare services." Inst. of Med., Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care 5 (2002), *available at* https://www.nap.edu/read/10260/ chapter/1#ii ("IOM"); *see also* Tara Culp-Ressler, *Challenging Medical Racism and Physicians' Preference for White Patients,* Think Progress, Feb. 23, 2015, https://thinkprogress.org/ challenging-medical-racism-and-physicians-preference-for-white-patients-59bec589df88/.

Such disparities are not attributable to socioeconomic differences, the IOM observed: "The majority of studies … find that racial and ethnic disparities remain even after adjustment for socioeconomic ***11** differences and other healthcare access-related factors." *Id.; see also* Erin Peterson et al., *Why childbirth is a death sentence for many black moms,* Oct. 13, 2018, https://www.11alive.com/article/news/investigations/mothers-matter/ why-childbirth-is-a-death-sentence-for-many-black-moms/85-604079621 ("Black women die at higher rates regardless of their education, how much money they make or preexisting conditions."). Rather, research suggests "that healthcare providers' diagnostic and treatment decisions, as well as their feelings about patients, are influenced by patients' race or ethnicity." IOM, *supra,* at 11. Among other studies, the IOM cited one that "found that doctors rated black patients as less intelligent, less educated, more likely to abuse drugs and alcohol, more likely to fail to comply with medical advice, more likely to lack social support, and less likely to participate in

cardiac rehabilitation than white patients, even after patients' income, education, and personality characteristics were taken into account." IOM, *supra,* at 11.

Planned Parenthood itself has decried the racial disparities in the delivery of healthcare services and has acknowledged that such disparities cannot be explained solely by socioeconomic factors:

> [E]ven after accounting for socioeconomic factors, educated, middle-class Black women were found to be at even higher risk of having smaller, premature babies with a lower chance of survival. A growing body of research is linking racism-related stress and chronic worry about racial discrimination with Black-White ***12** disparities. The U.S. has a legacy of reproductive oppression which may cause some women to delay getting care. And unconscious bias may also play an important role.

Birth Outcome Disparities Among Black Women, Planned Parenthood of the Pacific Southwest, Inc., Blog (Mar. 2, 2018, 11:04 PM), https://www.plannedparenthood.org/planned-parenthood-pacific-southwest/ blog/birth-outcome-disparities-among-black-women.

In Planned Parenthoods's narrative, abortion is always described as part of the *solution* to these disparities - not part of the problem. *See id.* (recommending "reproductive life planning and pre-conception care services offered at [Planned Parenthood]" as part of the path "to better birth outcomes for Black women"); *see also* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture,* 11 Guttmacher Policy Review 3, Aug. 6, 2008, *available at* https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture. Abortion advocates never acknowledge that the correlation of the concentration of abortion clinics near minority communities with *increasing* unintended pregnancy and abortion *in those same communities* suggests at least that "reproductive life planning" services are not *improving* outcomes for minority women.

In fact, the correlation between increased access to abortion services and poorer health outcomes suggests that the abortion industry is harming those women. Despite the barriers to collecting data about abortion, scientists are increasingly able to document ***13** connections between abortion and the negative health outcomes that afflict minority communities. *See, e.g.,* Brent Rooney et al., *Does Induced Abortion Account for Racial Disparity in Preterm Births, and Violate the Nuremberg Code?,* J. Am. Phys. & Surgeons, Winter 2008, at 102, *available at* http://www.jpands.org/vol13no4/ rooney.pdf (documenting a link between preterm birth and prior induced abortion). Occasionally, extreme instances of such outcomes even appear in the media. *See, e.g.,* Rosemary Parker, *Dead woman's ultrasound showed clot, problems after abortion, records show,* MichiganLive, Apr. 13, 2017, https://www.mlive.com/news/kalamazoo/index.ssf/2017/04/ dead_womans_ultrasound_showed.html (documenting the death of a young black woman after an abortion at Planned Parenthood); Matthew Hay Brown, *Abortion opponents want tighter regulations,* The Baltimore Sun, Mar. 2, 2011, https://www.baltimoresun.com/ bs-mtblog-2011-03-abortion_opponents_want_tighte-story.html (reporting tragic outcomes after abortion, including the death of a young black woman).

Perhaps it is unsurprising that abortion advocates deny that racial bias could infect the abortion industry, but there is no objective reason to doubt that racial bias exists at least as much in that industry as it does everywhere else. Just like other medical treatments, the available data confirm that the racial disparities in the incidence of abortion are not reducible to socioeconomic disparities. There are roughly twice as many poor white women in the United States as there are poor black women, and yet poor black women account ***14** for more of the nation's abortions (14.1%) than poor white women do (11.7%).*See* Rachel K. Jones & Megan L. Kavanaugh, *Changes in Abortion Rates Between 2000 and 2008 and Lifetime Incidence of Abortion,* 117 Obst. & Gyn. 1358-66 (June 2001). Thus, poverty can't be the whole story. Disparities in access cannot be a sufficient explanation either, since Planned Parenthood has made its services even more available to minority populations than to disadvantaged members of other groups, and its efforts have not slowed the increasing rate of minority abortions.

It is widely acknowledged that - consciously or unconsciously - the medical community treats minority patients differently than it treats similarly-situated white patients. There is no reason to believe that there is any *less* racism at work in the abortion context. Moreover, considering the abortion industry's history as an explicitly racist social movement, its unapologetic targeting of minority communities even to this day, and the increasingly poor health outcomes of the communities it claims to serve, there is every reason to believe that racism plays a profound role in the delivery of abortion services. *See* TooManyAborted.com, *The Negro Project,* http://www.toomanyaborted.com/thenegroproject/ (last visited Nov. 13, 2018) (noting the continuing effects of Margaret Sanger's "Negro Project" on today's black communities); Tanya L. Green, *The Negro Project: Margaret Sanger's EUGENIC Plan for Black America,* BlackGenocide.org, http://www.blackgenocide.org/archived_articles/negro.html (last visited Nov. 13, ***15** 2018) (describing the Negro Project and its unfortunate ongoing legacy).

II. Sex-Selection Abortions are a Reality in the United States.

Abortions for the purpose of eliminating a baby of an undesired sex occur frequently in the United States. Because women seeking abortions are not routinely required to declare their motivation, there are no statistics showing precisely how often sex selection is a motive, or the only motive, in seeking an abortion. *See* Sujatha Jesudason & Susannah Baruch, *Sex Selection: What Role for Providers,* 86 Contraception 6, 597 (2012), *available at* https://www.contraceptionjournal.org/article/S0010-7824(12)00796-2/pdf (acknowledging lack of "official data on the frequency of pre- or during-pregnancy sex selection," but provider experience and media coverage indicating it is a common practice). But data from the few groups with a known single-gender preference, widespread acceptance of other types of sex-selective reproductive technology, and mainstream defense of the right to sex-selective abortion all demonstrate that sex-selective abortion is a reality in the United States.

A. Available statistics reflect widespread use of sex-selective abortion.

Sex-selective abortion is not typically detectible in birth rate statistics because it can be used to eliminate either sex, but where a cultural group has a ***16** single-gender preference, the results of sex-selection abortion can be seen in altered sex ratios at birth (SRBs). Studies of data from the "Asian-Pacific" population, which is characterized by "son-preference," from the 2000 census revealed "[n]aturally impossible SRBs within particular ethnic groups. ..." Nicholas Eberstadt, *The Global War Against Baby Girls,* The New Atlantis, Fall 2011, *available at* https://www.thenewatlantis.com/publications/ the-global-war-against-baby-girls. In other words, the sex-ratios at birth of the children of Americans of Asian-Pacific origin were skewed so far from what is naturally possible that the use of sex-selection to avoid the birth of daughters is undeniable. Moreover, the sex-ratios at birth became more sharply distorted among babies later in birth-order, which "strongly suggest[s] that sex-selective abortions were the driver." *Id.;* Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data,* 1 Am. Econ. J.: Applied Econ. 2, 1, 3, 7, 15, 25-26 (2009), *available at* https://pdfs.semanticscholar.org/ 8f71/b2fb8f1184351113414f5d4201e02fb70e95.pdf (concluding that Chinese and Indian parents were more likely to have a son at their third and fourth births than the other ethnic groups that were studied); Kelsey Harkness, *Sex Selection Abortions are Rife in the U.S.,* Newsweek, Apr. 14, 2016, *available at* https://www.newsweek.com/sex-selection-abortion-rife-us-447403; *see also* Sunita Puri et al., *"There Is Such a Thing as Too Many Daughters, but Not Too Many Sons": A Qualitative Study of Son Preference and Fetal Sex Selection Among Indian Immigrants in the United States,* 72 Soc. Sci. & Med. 1169 (2011) (study of 65 Indian ***17** immigrant women "found that 40% of the women interviewed had terminated prior pregnancies with female fetuses and that 89% of women carrying female fetuses in their current pregnancy pursued an abortion").

Although statistics can only reflect the practice when there is a single gender preference, there is no reason to believe that only women in cultures with a "son-preference" have availed themselves of sex-selective abortion in the United States. Medical providers in the United States often cater to the preferences of prospective parents to achieve a certain "family balance" in terms of number and gender of children. Jesudason & Baruch, *supra,* at 597 (elaborating on "family balancing" as a motive for sex selection). This "family balancing" motivation for sex-selective abortions exists wherever pre-natal diagnosis and abortion are both available, and its prevalence is evident in the lucrative "reproductive technology" industry.

B. Americans freely make use of reproductive technologies for the purpose of selecting a child of a particular sex.

Although abortions for the purpose of sex-selection are not susceptible to data tracking, it is well established that Americans embrace several other reproductive technologies for the purpose of choosing a future baby's sex, including one that, like abortion, ends the lives of one's own already-conceived genetic offspring. A lucrative industry has developed around ***18** offering prospective parents the ability to select their baby's gender via pre-implantation genetic diagnosis ("PGD"). Jasmeet Sidhu, *How to Buy a Daughter: Choosing the sex of your baby has become a multi-million-dollar industry,* Slate.com, Sept. 14, 2012, *available at* http://www.slate.com/articles/health_and_science/medical_examiner/2012/09/sex_selection_in_babies_through_pgd_americans_are_paying_to_have_daughters_rather_than_sons_.html ("Gender selection now rakes in revenues of at least $100 million every year.").

PGD refers to the testing of embryos generated by in vitro fertilization for particular traits. *Id.* Once the embryos are sorted by trait, parents may choose which to implant in a women's uterus in order to bear a baby with the desired characteristic. PGD is used throughout the world for diagnostic purposes, but the United States is one of the only countries in which PGD is legal for non-medical reasons such as sex-selection. *Id.* ("It is illegal for use for nonmedical reasons in Canada, the U.K., and Australia."); Michelle J. Bayefsky, *Comparative preimplantation genetic diagnosis policy in Europe and the USA and its implications for reproductive tourism,* 3 Reprod. Biomedicine & Soc. Online 41 (2016) ("The USA stands apart in its laissez-faire approach towards the use of PGD."). Accordingly, the United States has become a destination for "medical tourism" in this area.

A 2004 study found that 40% of Americans had no concern about PGD as a means of selecting the gender of future children. Genetics & Public Policy Center, ***19** Reproductive Genetic Testing: What America Thinks 11 (2004), *available at* https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/976/ReproGenTestAmericaThinks.pdf?sequence=1&isAllowed=y. "A 2006 survey by Johns Hopkins University found that 42 percent of fertility clinics offered PGD for gender selection. ... [And] that was ... before many clinics undertook aggressive online marketing campaigns to drive the demand." Sidhu, *supra; see also* Bayefsky, *supra* ("Elective sex selection is reported to account for 9% of PGD uses in the USA."). PGD is popular with women because unwanted embryos are destroyed prior to implantation in the uterus, which avoids the need for a physically and emotionally taxing abortion. However, PGD is by no means easy: it involves medical procedures to harvest eggs and implant embryos; it is extremely costly; and it does not always yield viable embryos. *See, e.g.,* Sidhu, *supra.*

A less invasive and less costly method of trying to pre-select a baby's sex is "sperm sorting," which involves centrifugally sorting a sperm sample by weight into groups of sperm that are more or less likely to include a Y chromosome, then using a preferred group of sperm for IVF or artificial insemination. World Health Org. Genomic Resource Ctr., *Gender and Genetics: Genetic Technologies for Sex-Selection, Prefertilization,* http://www.who.int/genomics/gender/en/index4.html (last visited Nov. 13, 2018). This method of gender selection is far less invasive than PGD and far less expensive, but it is also far less reliable, with success rates of only 75 to 85%. *Id.*

***20** Sperm sorting is widely available in the United States, but at $1500 per attempt, it is still out of reach to most prospective parents, and, in up to 25% of cases, it yields an unwanted child of the opposite sex. *See id.*; *see also, e.g.,* Sidhu, *supra* (detailing the history of a mother who tried sperm sorting to achieve a female child, conceived a male she considered aborting, then went into debt for two rounds of IVF and PGD).

The demand within the United States for procedures such as PGD and sperm-sorting evidences a societal embrace of using reproductive technology for sex-selection. A culture in which the wealthy are engaging in PGD and sperm-sorting undoubtedly includes many who are pursuing the same result through the less costly means of sex-selective abortion.

C. Unlike most of the world, American abortion activists defend the choice to abort a fetus because of a preference for the other sex.

Fearing any narrowing of a woman's right to choose abortion, abortion proponents in the United States and the United Kingdom openly call for protecting the right to abort because of a preference for one sex or another: "If the U.S. Supreme Court thinks sex selection is sexist, more states will begin to chip away at a woman's reasons for terminating her pregnancy." Sital Kalantry, *Challenging the Narrative on Sex-Selective Abortion Bans,* Ms. Magazine Blog (Aug. 25, 2017). They recognize the inconsistency between ***21** viewing abortion as an absolute right and prohibiting certain reasons for choosing abortion: "Banning sex-selective abortion opens up a world in which there is such thing as a "good" and "bad" reason for an abortion." Pam Lowe, *Why I oppose a ban on sex-selection abortion,* The Conversation, Jan. 26, 2015, http://theconversation.com/why-i-oppose-a-ban-on-sex-selection-abortion-36684. "What could stop a state from banning abortions for reasons the majority regards as "trivial," such as wanting to complete one's education or be successful in a career?" Bonnie Steinbock, *Preventing Sex-Selective Abortions in America: A Solution in Search of a Problem,* The Hastings Center, Apr. 4, 2017, https://www.thehastingscenter.org/ preventing-sex-selective-abortions-america-solution-search-problem/.

Thus, faced with legislation prohibiting sex discrimination by means of sex-selective abortion, even civil rights activists condemn such legislation as a "burden on women obtaining abortions that they want for whatever reason." Kelly P. Kissell, *Arkansas considers banning 'sex-selection' abortions,* APnews.com, Feb. 9, 2017, https://apnews.com/c4c4d2f92b634a8f8e9d31 1b4c385fa9 (quoting Rita Sklar, executive director of Arkansas ACLU). "Once again, the call for government intervention to prevent sex selective abortion conflicts with the preservation of reproductive rights." Daniel Goodkind, Sex-Selective Abortion, Reproductive Rights and the Greater Locus of Gender Discrimination in Family Formation: Cairo's Unresolved Questions 16 (1997), *available at* https://www.psc.isr.umich.edu/pubs/pdf/rr97-383.pdf. "[E]ven the most ***22** terrible reason for having an abortion holds more sway than the best imaginable reason for compelling a woman to carry to term." Sarah Ditum, *Why Women Have a Right to Sex-Selective Abortion,* The Guardian, Sep. 19, 2013, https://www.theguardian.com/commentis free/2013/sep/19/sex-selective-abortion-womans-right.

Given public support for using reproductive technology to choose the gender of born children, as well as cultural defense of sex-selective abortion, and data from son-preferring ethnic groups, it is impossible to deny that abortions for the purpose of sex-selection are routinely being performed in the United States.

III. Abortion for the Purpose of Eliminating a Disabled Person is Commonplace in the United States.

A 2012 study of Down syndrome terminations in the United States demonstrates that prospective parents choose to terminate approximately 67% of fetuses diagnosed prenatally with Down syndrome. J.L. Natoli et al., *Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995-2011),* 32 Prenatal Diagnosis 142 (2012), *available at* https://www.ncbi.nlm.nih.gov/pubmed/22418958. The number of births of people with Down syndrome in the United States is therefore 30% below natural rates. Gert de Graaf et al., *Estimates of the live births, natural losses, and elective terminations with Down syndrome in the United States,* 167A Am. J. Med. Genetics 756 (2015).

***23** These numbers do not rival the decimation in Down syndrome populations in places like Iceland, where only one or two babies are born with Down syndrome per year, or Denmark, where only four prenatally diagnosed Down syndrome babies were born in 2016. Jerome Lejeune Foundation, *All Danish babies with Down syndrome aborted but 4 in 2016,* Dec. 22, 2017, https://lejeunefoundation.org/denmark-downsyndrome-abortion/. However, the United States' termination rate is sufficient to raise concern, particularly given that Down syndrome is the most common and among the least debilitating of the disorders that can be diagnosed prenatally. Lindsay Abrams, *Prenatal Testing: Earlier and More Accurate Than Ever,* The Atlantic, Nov. 5, 2012, *available at* http://www.theatlantic.com/health/archive/2012/11/ prenatal-testing-earlier-and-more-accurate-than-ever/264472/2/. People with Down syndrome can live lives of ordinary length and function well enough to live independently and be employed. National Down Syndrome Society, *Down Syndrome Facts,* https://www.ndss.org/about-down-

syndrome/down-syndrome-facts/ (last visited Nov. 13, 2018). Though less thoroughly documented, fetuses diagnosed with more debilitating disorders are undoubtedly aborted at higher rates even than 67%. *See, e.g.,* I.C. Lakovschek et al., *Natural outcome of trisomy 13, trisomy 18, and triploidy after prenatal diagnosis,* 155A Am. J. Med. Genetics 2626 (2011) (studying a population of prenatally diagnosed fetuses with triploidy, trisomy 13, and trisomy 18, and finding that 78% of cases were terminated, so only 22% remained for a study of "natural outcomes").

***24** Government has myriad legitimate interests in preventing the termination of disabled fetuses. Disability rights activists argue that aborting a fetus on the basis of disability is the vilest form of disability discrimination, victimizing the disabled "at their most vulnerable stage." Grazie Pozo Christie, *Eugenics and Equality Can't Mix: Aborting babies with detected disabilities is incompatible with equality,* U.S. News & World Report, Aug. 26, 2016, *available at* https://www.usnews.com/opinion/articles/2016-08-26/ eugenic-abortion-is-a-challenge-to-equality-for-people-with-disabilities. In addition to moral concerns, a high rate of terminations raises practical concerns for the future diversity of the United States, because the practice of eliminating disabled people may become self-perpetuating: more terminations of disabled fetuses "could in turn result in increased social pressure to terminate, particularly if the diagnosed conditions were to become rarer in society resulting in a decline of support services (e.g. respite care homes for Down's [sic] Syndrome families). In practice, it could become increasingly difficult for a patient who has received a positive test result not to 'choose' to abort." Caroline Wright, PHG Foundation, Cell-free fetal nucleic acids for non-invasive prenatal diagnosis: report of the uk expert working group 17 (2009), *available at* http://www.phgfoundation.org/documents/214_1260287360.pdf. Moreover, eliminating most people with disabilities raises grave concerns for the lives of those who do live with disabilities. In addition to dwindling support for their unique challenges, increasing rarity and the sense of ***25** disability being "avoidable" is likely to increase the stigma associated with disability. *Id.* at 29.

IV. Eugenic Abortions are Likely to Become More Common in the U.S. As Non-Invasive Prenatal Diagnostic Tools are Increasingly Available and Increasingly Sophisticated.

Compounding the timeless objections to determining which humans will be born based on traits like sex and disability is the strong likelihood that the practice of trait-selective abortion is going to grow exponentially in frequency because of the widespread use of non-invasive prenatal diagnostic ("NIPD") technology. *See* Erin Biba, *This Simple Blood Test Reveals Birth Defects - And the Future of Pregnancy,* Wired Magazine, XX/XX/2012, https://www.wired.com/2012/12/ff-prenatal-testing/; Henry T. Greely, *Get Ready for the Flood of Fetal Gene Screening,* 469 Nature 289, 289 (2011). In the past several years, new NIPD tests have become available, both through providers and over-the-counter, that indicate very early in pregnancy the various genetic features of babies, including sex and disability status. *See, e.g.,* Abrams, *supra;* Carolyn Y. Johnson, *DNA Blood Test Can Detect Prenatal Problems,* Boston Globe, Feb. 26, 2014, *available at* http://www.bostonglobe.com/lifestyle/health-wellness/2014/02/26/ new-study-suggests-prenatal-genetic-tests-could-offered-all-pregnant-women/ V1GQuRL4jkr1M60e1XcQCK/story.html.

***26** The new tests, which evaluate fetal DNA present in the mother's blood, have three major advantages over past methods of prenatal testing: (1) they are noninvasive of the uterus because they require only a maternal blood test, (2) they are increasingly inexpensive as the technology becomes more widespread, and (3) they are accurate very early in pregnancy. Jaime S. King, And *Genetic Testing for All ... The Coming Revolution in Non-Invasive Prenatal Genetic Testing,* 42 Rutgers L. J. 599, 616 (2011). As a result of all of these features, medical and social commentators agree that the incidence of trait-selective abortion is likely to greatly increase in the coming years. *See, e.g.,* Wright, *supra,* at 19 ("The major ethical concern in this area is therefore that prenatal fetal sex determination, in combination with termination of pregnancy, could result in sex selection for non-medical or 'trivial' reasons, which could have major implications for society."); Michael Stokes Paulsen, *It's a Girl,* Public Discourse, Oct. 24, 2011, https://www.thepublicdiscourse.com/ 2011/10/4149/ ("Watch for a spike in abortion rates over the next few years as parents find it easier and cheaper to 'choose' to have a boy by killing the fetus if ... it's a girl").

V. Anti-Discrimination Laws Like HEA 1337 are a Reasonable Legislative Response to Odious Social Practices.

The Court should grant certiorari in order to vindicate states' rights to pass sensible legislation designed to address the troubling phenomenon of ***27** discrimination based on race, gender, and disability in the abortion context. The State of Indiana undeniably has a legitimate interest in trying to end discrimination against racial minorities, the female sex, and disabled persons. There is ample evidence, from this country and others, to support the enactment of legislative prohibitions as one strategy for combating such invidious discrimination.

For example, although racial discrimination in medicine is a complicated issue that defies simple solution, the Institute of Medicine recommended enforcement of anti-discrimination laws as one strategy for addressing it. *See* IOM, *supra,* at 187-88. There is no reason to think that enforcing a prohibition on racial discrimination in the abortion industry would contribute any less to ameliorating the gross racial disparities in that setting.

Meanwhile, as noted above, many countries prohibit sex discrimination in the context of other reproductive technologies. *See supra* Section II.B. Some countries also prohibit sex-selective abortion,[3] while ***28** others are considering banning it.[4] And as Petitioners have pointed out, many other States have already enacted laws banning abortions on the basis of race, gender, or disability. *See* Pet. for Cert, at 25.[5]

3 *See, e.g.,* Chinadaily.com, *China bans selective abortion to fix imbalance,* July 16, 2004, http://www.chinadaily.com.cn/ english/ doc/2004-07/16/content_349051.htm; Arindam Nandi & Anil Deolalikar, *Does a legal ban on sex-selective abortions improve child sex ratios? Evidence from a policy change in India,* 103 J. of Devel. Econ. 216 (2013) (arguing that India's ban on sex-selective abortions has had a positive impact on that country's gender imbalance), *available at* https://econpapers.repec.org/article/ eeedeveco/ v_3a103_3ay_3a2013_3ai_3ac_3ap_3a216-228.htm.

4 *See, e.g.,* Adam Forrest, *Early Gender tests 'leading to selective abortions of girls in UK',* Independent, Sept. 17, 2018, https:// www.independent.co.uk/news/health/ selective-abortions-gender-tests-girls-uk-labour-a8540851.html (discussing a movement in the UK to ban sex-selective abortion).

5 Eight state laws outlawing sex-selective abortion: Ariz. Rev. Stat. Ann. § 13-3603.02; Ark. Code Ann. § 20-16-1904 (eff. Jan. 1, 2018); Kan. Stat. Ann. § 65-6726; N.C. Gen. Stat. § 90-21.121; N.D. Cent. Code § 14-02.1-04.1; Okla. Stat. tit. 63, § 1-731.2; 18 Pa. Cons. Stat. § 3204; S.D. Codified Laws § 34-23A-64. One state law banning abortions on the basis of race: Ariz. Rev. Stat. Ann. § 13-3603.02. Three state laws banning abortions on the basis of genetic abnormality: La. Rev. Stat. Ann. §40:1061.1.2; N.D. Cent. Code §14-02.1-04.1; Ohio Rev. Code Ann. § 2919.10.

Banning abortions on the basis of race, gender, and disability is a prudent - even laudable - step for a legislature seeking to deter increasingly widespread eugenic practices that devalue and disadvantage the most vulnerable members of society. This Court should not permit the Seventh Circuit decision invalidating such a ban to stand.

***29 CONCLUSION**

The Supreme Court should grant certiorari in this case in order to reverse the Seventh Circuit and affirm that States may prohibit abortion based on a baby's race, gender, or disability.

Respectfully submitted,

Thomas L. Brejcha

Counsel of Record

Sarah E. Pitlyk

Stephen M. Crampton

Thomas More Society

309 W. Washington Street, Suite 1250

Chicago, Illinois 60606

(312) 782-1680

tbrejcha@thomasmoresociety.org

Counsel for Amici Curiae, The Restoration Project; Pastor Joseph Parker, pastor of Greater Turner Chapel AM.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society

November 15, 2018

End of Document

Nomination of Sarah E. Pitlyk, to be United States District Court Judge
for the Eastern District of Missouri
Questions for the Record
Submitted October 2, 2019

QUESTIONS FROM SENATOR COONS

1. With respect to substantive due process, what factors do you look to when a case requires you to determine whether a right is fundamental and protected under the Fourteenth Amendment?

The U.S. Supreme Court has evaluated fundamental rights in a series of cases. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). In determining whether a right is fundamental and protected under the Fourteenth Amendment, I would follow the principles identified in those cases.

a. Would you consider whether the right is expressly enumerated in the Constitution?

If a right is expressly enumerated in the Constitution, that right is protected from interference by the federal government by the clause enumerating that right. The Supreme Court has said that whether the right is expressly enumerated is relevant for purposes of applying the incorporation doctrine under the Fourteenth Amendment, *see McDonald v. City of Chicago*, 561 U.S. 742 (2010), and I would apply that precedent.

b. Would you consider whether the right is deeply rooted in this nation's history and tradition? If so, what types of sources would you consult to determine whether a right is deeply rooted in this nation's history and tradition?

Yes. The Supreme Court has explained that a right is fundamental and protected under the Fourteenth Amendment if it is deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). If confirmed, I would faithfully apply Supreme Court precedent and rely on sources used by the Supreme Court.

c. Would you consider whether the right has previously been recognized by Supreme Court or circuit precedent? What about the precedent of a court of appeals?

If confirmed, I would be bound to apply all applicable Supreme Court and Eighth Circuit precedent. *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *BPS Guard Servs., Inc. v. N.L.R.B.*, 942 F.2d 519, 524 (8th Cir. 1991). Consistent with Eighth Circuit precedent, I would give "reasoned" decisions by other U.S. Courts of Appeals "great weight and precedential value." *United States v. Auginash*, 266 F.3d 781, 784 (8th Cir. 2001) (quoting *Alden's, Inc. v. Miller*, 610 F.2d 528, 541 (8th Cir. 1979)).

d. Would you consider whether a similar right has previously been recognized by Supreme Court or circuit precedent? What about whether a similar right had been recognized by Supreme Court or circuit precedent?

Yes, consistent with the obligation to consider the rationale outlined in prior precedent.

e. Would you consider whether the right is central to "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"? *See Planned Parenthood v. Casey*, 505 U.S. 833, 581 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*).

Yes. The Supreme Court considered that factor in *Casey* and *Lawrence*. If confirmed, I would follow *Casey*, *Lawrence*, and all precedents of the U.S. Supreme Court and Eighth Circuit.

f. What other factors would you consider?

If confirmed, I would consider all other relevant factors under Supreme Court and Eighth Circuit precedent.

2. Does the Fourteenth Amendment's promise of "equal protection" guarantee equality across race and gender, or does it only require racial equality?

The Supreme Court has held that the Fourteenth Amendment's Equal Protection Clause applies to gender as well as race. The Clause prohibits a government from denying "to women, simply because they are women, full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities." *United States v. Virginia*, 518 U.S. 515, 532 (1996). A gender-based government action is unconstitutional absent "an 'exceedingly persuasive justification' for that action." *Id.* at 531.

a. If you conclude that it does require gender equality under the law, how do you respond to the argument that the Fourteenth Amendment was passed to address certain forms of racial inequality during Reconstruction, and thus was not intended to create a new protection against gender discrimination?

The response is that longstanding and binding precedent establishes the scope of the Equal Protection Clause. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976); *Reed v. Reed*, 404 U.S. 71 (1971).

b. If you conclude that the Fourteenth Amendment has always required equal treatment of men and women, as some originalists contend, why was it not until 1996, in *United States v. Virginia*, 518 U.S. 515 (1996), that states were required to provide the same educational opportunities to men and women?

Decisions of the Supreme Court establish what the Fourteenth Amendment has always required, given that judicial decisions are "regarded as an expression of pre-existing law." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 847 (1990). I am unfamiliar with the circumstances around the filing of *United States v. Virginia.*

c. Does the Fourteenth Amendment require that states treat gay and lesbian couples the same as heterosexual couples? Why or why not?

The Fourteenth Amendment requires that same-sex couples be afforded the right to marry "on the same terms as accorded to couples of the opposite sex." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015). If confirmed, I would faithfully apply *Obergefell* and all other relevant Supreme Court and Eighth Circuit precedent.

d. Does the Fourteenth Amendment require that states treat transgender people the same as those who are not transgender? Why or why not?

Equality under the law is a foundational principle of our legal system. This issue is the subject of pending or impending litigation and therefore I cannot express an opinion as a judicial nominee. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court.").

3. Do you agree that there is a constitutional right to privacy that protects a woman's right to use contraceptives?

The Supreme Court held that there is such a right in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972). If confirmed, I would faithfully apply these and all precedents of the Supreme Court and Eighth Circuit.

a. Do you agree that there is a constitutional right to privacy that protects a woman's right to obtain an abortion?

The Supreme Court held there is such a right in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). If confirmed, I would faithfully apply these and all precedents of the Supreme Court and Eighth Circuit.

b. Do you agree that there is a constitutional right to privacy that protects intimate relations between two consenting adults, regardless of their sexes or genders?

The Supreme Court held there is such a right in *Lawrence v. Texas*, 539 U.S. 558 (2003). If confirmed, I would faithfully apply *Lawrence* and all precedents of the Supreme Court and Eighth Circuit.

c. If you do not agree with any of the above, please explain whether these rights are protected or not and which constitutional rights or provisions encompass them.

Please see my responses to Questions 3, 3.a., and 3.b.

4. In *United States v. Virginia*, 518 U.S. 515, 536 (1996), the Court explained that in 1839, when the Virginia Military Institute was established, "[h]igher education at the time was considered dangerous for women," a view widely rejected today. In *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600-01 (2015), the Court reasoned, "As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser." This conclusion rejects arguments made by campaigns to prohibit same-sex marriage based on the purported negative impact of such marriages on children.

a. When is it appropriate to consider evidence that sheds light on our changing understanding of society?

The U.S. Supreme Court has explained how changes in society can be relevant to judicial considerations in a variety of contexts. If confirmed, I would follow those precedents that consider evidence of changed social understandings, including *Virginia* and *Obergefell* and other relevant Supreme Court and Eighth Circuit precedent.

b. What is the role of sociology, scientific evidence, and data in judicial analysis?

Please see my answer to Question 4.a. I would consider applicable Supreme Court and Eighth precedent to determine what role these sources should play in a particular context. In general, a trier of fact may consider such evidence when it has a reliable foundation and is relevant to a disputed issue. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

5. In the Supreme Court's *Obergefell* opinion, Justice Kennedy explained, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians."

a. Do you agree that after *Obergefell*, history and tradition should not limit the rights afforded to LGBT individuals?

If confirmed, I would faithfully apply *Obergefell* and all other relevant Supreme Court and Eighth Circuit precedent. *See, e.g.*, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1727 (2018) ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.").

b. When is it appropriate to apply Justice Kennedy's formulation of substantive due process?

Please see my answer to Question 5.a.

6. You are a member of the Federalist Society, a group whose members often advocate an "originalist" interpretation of the Constitution.

a. In his opinion for the unanimous Court in *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren wrote that although the "circumstances surrounding the adoption of the Fourteenth Amendment in 1868 . . . cast some light" on the amendment's original meaning, "it is not enough to resolve the problem with which we are faced. At best, they are inconclusive . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 489, 490-93. Do you consider *Brown* to be consistent with originalism even though the Court in *Brown* explicitly rejected the notion that the original meaning of the Fourteenth Amendment was dispositive or even conclusively supportive?

Brown v. Board of Education was correctly decided and has a special role in our constitutional history. While the debate is purely academic in light of the Supreme Court's holding, I have found compelling the work of scholars who argue that *Brown* is consistent with originalism. *See, e.g.*, Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995).

b. How do you respond to the criticism of originalism that terms like "'the freedom of speech,' 'equal protection,' and 'due process of law' are not precise or self-defining"? Robert Post & Reva Siegel, *Democratic Constitutionalism*, National Constitution Center, https://constitutioncenter.org/interactive-constitution/white-papers/democratic-constitutionalism (last visited Sept. 30, 2019).

As the criticism indicates, it may be difficult to determine the original public meaning of a constitutional provision. It is also difficult to apply that meaning to changed circumstances. Whether such an analysis is required depends on the precedent applicable in a particular case. If confirmed, I would faithfully apply all precedent of the Supreme Court and the Eighth Circuit related to constitutional interpretation.

c. Should the public's understanding of a constitutional provision's meaning at the time of its adoption ever be dispositive when interpreting that constitutional provision today?

In some cases, the Supreme Court has relied on the meaning of a provision at the time of its adoption. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). As a lower-court judge, I would be bound to follow all applicable precedent of the Supreme Court and the Eighth Circuit.

d. Does the public's original understanding of the scope of a constitutional provision constrain its application decades later?

Please see my response to Question 6.c.

e. What sources would you employ to discern the contours of a constitutional provision?

If confirmed, I would consult those sources that have been considered in relevant Supreme Court and Eighth Circuit precedent, as well as the arguments and evidence that litigants before me present in their briefs.

7. You graduated from law school in 2008, and you noted in your Senate Judiciary Committee Questionnaire, "Few of my cases have involved trials, and for those that have, the trials have not occurred during my tenure on the case."

a. What motions have you argued under the Federal Rules of Civil Procedure?

Virtually every motion I've ever drafted has been provided for by one or another Federal Rule of Civil Procedure, so this will be hard to answer comprehensively, but types of such motions would include, *inter alia*: motions for preliminary injunctions; motions to strike, stay, intervene, compel, transfer, and continue; proposed judgments; motions for attorney's fees; as well as dispositive motions (e.g., various kinds of motions to dismiss under Rule 12, motions for summary judgment, motions for judgment on the pleadings, etc.). I've also drafted all manner of appellate briefs, including cert petitions and amicus briefs, under the Federal Rules of Appellate Procedure.

b. What motions have you argued under the Federal Rules of Criminal Procedure?

As noted on my Senate Judiciary Questionnaire, my background is primarily in civil litigation, and the criminal case in which I have been most involved has been in state court. Obviously many of the same issues arise in state court as in federal, and certainly many of the substantive issues I've dealt with in criminal cases have related to federal constitutional principles of the kind that the Federal Rules of Criminal Procedure protect (e.g., Fifth Amendment privilege against self-incrimination, Sixth Amendment right to a public trial).

c. Have you presented argument in a federal court on an evidentiary issue governed by the Federal Rules of Evidence?

I have argued evidentiary issues governed by the Federal Rules of Evidence on paper in federal court.

d. Have you taken a deposition in a federal court proceeding?

No. Few of my cases have involved depositions while I've been involved in them, and in those that have, I have been working with teams of attorneys many of whom lived much closer to where they were taking place. As a mother of small children (something I have been almost the entire time I have been a lawyer), it has been my practice to avoid travel unless I'm indispensable, and I have been lucky enough to work with colleagues who support and enable that decision.

e. Have you defended a deposition in a federal court proceeding?

No. See my answer to 7.d.

f. Have you argued a discovery motion in federal court?

I'm not sure what would fall into the category of "discovery motion," but I have drafted and responded to written discovery requests in federal court. I've also litigated several motions to compel over the years, but I'm not sure of the breakdown between federal and state court. And I have reviewed many discovery-related motions drafted by co-counsel in federal litigation.

g. Have you argued a motion in limine in federal court?

In writing, yes.

h. Have you participated in a federal court mediation?

No.

i. Have you participated in a pre-trial conference in federal court?

Yes.

j. Have you participated in voir dire in federal court?

I have assisted in the preparation of jury questionnaires. Otherwise, I have only observed other attorneys conduct voir dire.

k. Have you examined a fact witness in federal court?

No. Like most civil litigators, my cases rarely go to trial. The first trial in one of my cases is happening right now.

l. Have you examined an expert witness in federal court?

No. Please see my response to Question 7.k.

8. The American Bar Association Standing Committee on the Federal Judiciary unanimously determined that you are "Not Qualified" for the position of federal district court judge based on your limited litigation experience as a practicing attorney, including your lack of trial experience.

a. If confirmed, what experience will you rely upon as you approach the task of being a federal trial court judge?

b. Why do you believe you are presently qualified to be a federal district court judge?

Response to Questions 8.a and 8.b: Over the past 11.5 years, I have represented a wide variety of clients in an even wider variety of litigation matters, from playing a small role as a new associate in giant products liability litigations at Covington to playing a central role in constitutional litigation at the Thomas More Society, and in between working with many different teams of attorneys on a whole range of litigation matters, e.g., white collar criminal defense, breach of contract disputes, municipal tax litigation, non-profit corporate governance, open records, RICO, conspiracy, civil and criminal eavesdropping, as well as numerous constitutional matters arising under the First, Fifth, and Sixth Amendments. With respect to these matters, I have litigated issues as mundane as discrete procedural issues in trial court and as momentous as comprehensive dispositive motions and appellate briefing. I have drafted pleadings; developed factual affidavits; attended case status conferences; corresponded with clients, opposing counsel and courts; issued and answered written discovery requests; drafted pretrial evidentiary motions; worked on jury instructions, voir dire questionnaires, and witness examination outlines. I have also briefed all manner of procedural and substantive motions, e.g., motions for preliminary injunctions; motions to strike, stay, intervene, compel, transfer, and continue; proposed judgments; as well as dispositive motions and appellate briefs. I argued one of those appeals in the Ninth Circuit. And I have submitted 10 briefs to the United States Supreme Court in a variety of cases on behalf of a variety of clients.

Also, although the bulk of my experience has been in civil litigation, I have also worked on several criminal matters. Just this month I spent a week defending a client in a preliminary hearing in California state criminal court as part of a small litigation team. I had just returned from that hearing when I met with the representative of the ABA and therefore was able to recount in detail the scope of my contributions in the context of that hearing—from the preparation of exhibits to the (successful) overnight briefing of an unanticipated motion that implicated critical First and Sixth Amendment rights. I also recounted my contributions to our client's criminal defense over the past year or so in disputes relating to intervention by third parties, the proposed sealing of evidence, and the requirements of the Sixth Amendment in the context of the preliminary hearing. And I told my interviewer about contributions I had made to criminal matters in the past. It was surprising, therefore, to read (in a public letter that many, including members of the Senate Judiciary Committee, will accept as true) that I had "never participated at any stage of a criminal matter."

I acknowledge that there can be good-faith disagreement about whether my particular practice has provided me with the ideal preparation to be a district judge, but I don't think that there is any question that I can—and will—do the job well. It is true that I have specialized in written legal analysis and that none of my cases has gone to trial (until, coincidentally, this month), but that is typical of complex civil litigation, especially in federal courts. That means that a substantial (and growing) portion of the job of a district judge is also written analysis of legal questions, to which the bulk of my experience is directly relevant. I have, of course, endeavored to learn as much as possible about other aspects of the job of a district judge as I have considered the possibility of taking on that awesome responsibility, and I have concluded that I have all the tools I need to do the job well, most notably: a broad foundation of substantive and procedural expertise; the humility to recognize what I need to learn coupled with the intellect to learn it quickly and well; the work ethic and high standards to ensure excellent work product; and the temperament to conduct a courtroom and chambers with civility and respect for everyone who enters.

9. You have filed amici briefs challenging the Affordable Care Act's contraceptive mandate. In a brief you filed in *Sebelius v. Hobby Lobby Stores, Inc.*, *sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), you asserted that "the Mandate requires religiously objecting employers to cooperate in the grave moral wrong of scandal – *i.e.*, encouraging others to engage in wrongdoing – in addition to their cooperation in the grave moral wrong of their employees' actual use of abortifacients or contraceptives."

a. What is the appropriate legal analysis when a business owner's religious rights interfere with the constitutionally protected liberty interests of his/her employees?

As a judicial nominee, it would be improper for me to pre-judge any issue that could come before me in a court, as conflicts between religious rights of business owners and the constitutionally-protected liberty interests of their employees certainly could. That said, the Supreme Court made clear in *Burwell v. Hobby Lobby* that such conflicts, at least involving "closely held corporations," are subject to the standard set out in the federal Religious Freedom Restoration Act, 42 U.S.C.A. § 2000bb-1: A law may not substantially burden a business owner's exercise of religion unless (a) it furthers a compelling governmental interest, and (b) it is the least restrictive means of furthering that interest.

b. If any attenuated role in supporting a third party's conduct can be claimed as a violation of the employer's religious freedom, many neutral laws and personal freedoms are at risk. What limiting principle applies?

There are two limiting principles internal to the standard: (a) the legal requirement has to impose a substantial burden on religious exercise—not superficial or pretextual; and, (b) even if it does impose a substantial burden, it can still be upheld if it is the least restrictive means of furthering a compelling interest.

How those principles should be applied cannot be analyzed in the hypothetical,

and even if it could, it would be improper for me to do so. *See* Canon 3(A)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

10. In a 2018 article you authored in the *National Review*, you called the Supreme Court's decision to uphold the Affordable Care Act "unprincipled." What did you mean?

That op-ed was published before then-Judge Kavanaugh was nominated to the Supreme Court, in response to certain specific criticisms that had been leveled at his judicial record. As a former clerk, I was more familiar than most with that record, and I wanted to support Judge Kavanaugh, so I published an op-ed explaining his opinions in relevant cases. One of the criticisms to which I was responding related to the Supreme Court's decision in *NFIB v. Sebelius*, the outcome of which many commentators have suggested was at least partially determined by political considerations rather than jurisprudential principles.

11. In notes for a January 2019 speech, you described Justice Kavanaugh as "the kind of the [sic] judge who does not deliver politically biased decisions like the ones that we have seen our pro-life clients suffer time and time again." Which decisions were you referring to as "politically biased decisions"? Please provide examples.

As advocates for pro-life clients, members of my firm have had occasion to question whether decisions in some of our cases have been colored by bias against pro-life activists. I wasn't referring to any particular instance of that phenomenon and do not think it is consistent with my obligations to my clients to disclose details of individual cases in this context.

12. In an amici brief you filed in 2013 in *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291 (2014), you asserted that race-conscious policies inherently impose various harms, including that "[r]acial-preference schemes unjustly impose the costs of remedying past discrimination on individuals who have no personal responsibility for the prior wrongs."

a. Do you believe that ensuring a diverse learning environment can be a compelling interest?

"The Government unquestionably has a compelling interest in remedying past and present discrimination by a state actor." *United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion). Whether measures "promoting diversity" are justified by that "compelling interest" would depend on whether those measures are "narrowly tailored" to serve the State's interest in remedying discrimination. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).

b. Do you believe that any consideration of race in admissions is unconstitutional?

No, I do not. The Supreme Court has repeatedly upheld race-conscious admissions programs as constitutional. *See, e.g., Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198

(2016); *Grutter v. Bollinger*, 539 U.S. 306, 306 (2003). I will apply all of the Supreme Court's precedents fully and faithfully.

c. You also asserted that "in the specific context of selective educational programs, a burgeoning body of empirical evidence indicates that racial preferences actually harm their intended beneficiaries by systematically mismatching minority students with programs where their risk of underperformance is heightened." However, your brief provides scant citations for this statement. Please list the empirical evidence to which you were referring.

Immediately following the sentence you quote are citations to an amicus brief of Professor Richard Sander filed in *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297 (2013) and *Mismatch*, a book authored by Professor Sander and Stuart Taylor, Jr. in 2012. Both of these sources report on empirical studies and analyses and provide support for the statement quote.

13. In your notes for a 2018 Federalist Society speech, you stated that "[a]nother preoccupation of Judge Kavanaugh's administrative law jurisprudence has been how the structure of so-called 'independent agencies' threatens democratic accountability, individual liberty, and government effectiveness." You noted that "in a decision published the year [you] clerked, Judge Kavanaugh expanded on his skepticism of administrative agencies in a lengthy concurrence describing how they were made possible by the 1935 decision *Humphrey's Executor*."

a. Do you agree that the rationale and holding of *Humphrey's Executor*, 295 U.S. 602 (1935), remain good law?

Yes, *Humphrey's Executor* is good law, and if I am confirmed, I will follow it fully and faithfully as I will every other decision of the Supreme Court and the Eighth Circuit.

b. Do you agree that the rationale and holding of *Morrison v. Olson*, 487 U.S. 654 (1988), remain good law?

Yes, *Morrison v. Olson* is good law, and if I am confirmed, I will follow it fully and faithfully as I will every other decision of the Supreme Court and the Eighth Circuit.

Questions for the Record for Sarah E. Pitlyk
From Senator Mazie K. Hirono

1. Prior nominees before the Committee have spoken about the importance of training to help judges identify their implicit biases.

a. Do you agree that training on implicit bias is important for judges to have?

I don't know precisely what kind of training this refers to, but I agree that judges could benefit from learning how to mitigate the effects of implicit bias.

b. Have you ever taken such training?

No.

c. If confirmed, do you commit to taking training on implicit bias?

I am open to considering any education or training opportunity that will enhance my ability to deliver impartial and equal justice to all litigants.

2. At the hearing, I asked you about a case in which you argued that frozen "embryos are living human beings and 'unborn children'" with legal rights under Missouri law. You even argued that by recognizing the ex-husband's right to withhold consent to having his ex-wife implant their frozen embryos, the trial "gave the father the unprecedented right to direct the death of his embryonic children." You stated that this argument was taken under Missouri law. But you personally spoke about this issue in a 2017 news article that purported to discuss the "dangers" of treating embryos like property instead of human life. In that article, which you submitted with your Senate Judiciary Questionnaire, you went beyond discussing the cases you worked on to state, "Surrogacy is harmful to mothers and children, so it's a practice society should not be enforcing."

a. Is it still your view that "[s]urrogacy is harmful to mothers and children, so it's a practice society should not be enforcing"?

In that article, a reporter related my answers to questions about a brief the Thomas More Society filed on behalf of the American Association of Pro-Life Obstetricians and Gynecologists, the American College of Pediatricians, the Catholic Medical Association, and the National Association of Catholic Nurses-U.S.A., among other groups, based on data provided by those groups. It is clear from the context that I was describing the views articulated in the brief and the concerns that motivated it, not my own personal beliefs.

If I am confirmed to the district court, neither my former client's litigating positions nor my personal beliefs will play a role in my judicial decision-making. I understand the shift in perspective that every advocate who is nominated to the bench has to undertake, and I will take the oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" very seriously. 28 U.S.C. § 453.

b. When you made that statement in 2017, was it your view that anyone who uses in vitro fertilization process (IVF) to create embryos but does not use all of them is killing their children?

The 2017 statement referred to in Question 2.a does not relate to discarding unused embryos after IVF, and neither does the brief it summarized, which describes physical burdens to surrogates and risks to their children.

c. When you made that statement in 2017, was it your view that those individuals could be criminally prosecuted for murder or manslaughter?

I have never argued, in a legal brief or personally, that anyone should be criminally prosecuted for the treatment of embryos.

d. Do you still hold these views?

Please see my answers to Questions 2.a through c.

3. When I asked you at the hearing about your argument that "well-established provisions of federal law reflect a legitimate and laudable public policy favoring childbirth over abortion by disfavoring the use of federal funds or privileges to facilitate or provide abortion," you responded there are "many instances" where the federal government has taken a position on this issue. You referred me to your amicus brief where you made this argument. You also pointed me to the Hyde Amendment, but you then conceded that the Hyde Amendment does not actually state a clear position on this issue.

a. Since you stated there were "many instances" to support your argument that "well-established provisions of federal law reflect a legitimate and laudable public policy favoring childbirth over abortion by disfavoring the use of federal funds or privileges to facilitate or provide abortion," please provide at least five examples that support your argument.

Asked in my hearing about such policies, I believe I disclaimed the ability to recite them but suggested that there were many instances based on my recollection that many Supreme Court cases have upheld policies, including the Hyde Amendment, on precisely these grounds. Some of those Supreme Court cases have addressed federal laws and some have addressed state laws. Here are five examples, as requested:

- *Harris v. McRae*, 448 U.S. 297 (1980), upheld the federal Hyde Amendment, prohibiting the use of federal funds to subsidize abortion. The Court stated that "[t]he Hyde Amendment, . . . by means of unequal subsidization of abortion and other medical services, encourages alternative activity [*i.e.*, childbirth] deemed in the public interest." *McRae*, 448 U.S. at 315.

- *Rust v. Sullivan*, 500 U.S. 173 (1991), upheld Title X's prohibition on the use of family-planning funds to subsidize abortions. The Court noted that "[t]he

Government['s] . . . decision to fund childbirth but not abortion 'places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy, but rather, by means of unequal subsidization of abortion and other medical services, encourages alternative activity deemed in the public interest.'" *Rust*, 500 U.S. at 201 (quoting *McRae*, 448 U.S. at 315).

- *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989), upheld a Missouri restriction on using public facilities to perform abortions. The Court held that the State had a right to "use public facilities and staff to encourage childbirth over abortion." *Webster*, 492 U.S. at 510.

- *Maher v. Roe*, 432 U.S. 464 (1977), upheld a Connecticut regulation prohibiting state funding of abortions despite state funding for childbirth. The Court stated that *Roe v. Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474. "[A] State is not required to show a compelling interest for its policy choice to favor normal childbirth any more than a State must so justify its election to fund public but not private education." *Id.* at 477.

- *Poelker v. Doe*, 432 U.S. 519 (1977), held that the city of St. Louis committed "no constitutional violation . . . in electing, as a policy choice, to provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions." *Poelker*, 432 U.S. at 521.

b. Please identify the evidence you cited in your amicus briefs to support your argument.

The Thomas More Society represents Susan B. Anthony List in a series of lawsuits in support of the Department of Health and Human Services' final rule regarding the Title X Family Planning Program. TMS's briefs on behalf of Susan B. Anthony List include citations to statutes and cases supporting the argument. A representative copy of these briefs is attached hereto.

4. I asked you at the hearing about your support for an Indiana law that banned abortions based on a fetus's race, sex, or disability diagnosis. You had filed an amicus brief in that case that accused the "modern abortion industry" of "target[ing] ethnic minorities." In your brief, you also asserted that "the correlation between increased access to abortion services and poorer health outcomes suggests that the abortion industry is harming those women." At the hearing, you merely referred me to your brief.

a. **Please provide the Committee the fact-based, scientific data you relied on to assert to the Supreme Court that the "modern abortion industry continues to target ethnic minorities" and that "the correlation between increased access to abortion services and poorer health outcomes suggests that the abortion industry is harming those women."**

On behalf of African-American pro-life advocates, my firm filed a brief supporting Indiana's prohibition on abortion for reasons of race, gender, or disability in *Box v. Planned Parenthood of Indiana & Kentucky*. Primary sources supporting the arguments my client advanced are included in that brief. A copy is attached hereto.

b. **Please provide the Committee the relevant sections of your brief that make these assertions and identify the fact-based, scientific data cited in your brief to support these claims.**

See my answer to 4.a.

5. You have dedicated much of your legal career to advocating against women's reproductive rights and abortions. In fact, in 2017, you took a job at the Thomas More Society where you could do that full time and said you "regularly marvel at how lucky we all are that [the Thomas More Society] exists to do this important work, and how lucky I am in particular to get to be involved in it."

a. Given your extensive and passionate record fighting against women's reproductive rights, why do you want to give up what you call "important work" and set aside your personal views to spend the rest of your life as a federal judge where you are duty-bound to follow the law and Supreme Court precedent such as *Roe v. Wade*?

Out of an 11.5-year legal career, I have worked for the past 2.5 years defending the constitutional and civil rights of pro-life clients. Prior to that I worked for three years at Covington & Burling LLP in Washington, D.C., for one year as a judicial clerk on the D.C. Circuit, and for almost four years at a small boutique doing general civil litigation. I have not dedicated the bulk of my legal career to any single thing except the practice of litigation.

I do think that the defense of my pro bono clients' constitutional and civil rights is important work, and I am grateful for the opportunity to have spent these past 2.5 years doing it. But I am under no illusion that it is the *only* kind of work that is important or rewarding. I have been fortunate enough to work with excellent colleagues on meaningful work at every stage of my career, and there are surely many other professional settings that are satisfying and fulfilling.

By all accounts, the Eastern District of Missouri is one of those settings. Countless conversations with judges, attorneys, law clerks, interns, and other courthouse personnel over the past several months have confirmed that, as a district judge on the Eastern District of Missouri, I will once again get to work with excellent, generous colleagues on interesting, important work.

Of course I recognize the difference between the function of a zealous advocate and that of an impartial judge. But both functions serve the same goal: the administration

of justice under the law. I am just as enthusiastic about serving that important goal as a judge as I have been about serving it as an advocate.

b. If you were confirmed as a judge and a conflict arose between your obligations to Supreme Court precedent and the Constitution and your personal views, to which you have dedicated your legal career and which you have personally advocated with your public statements, how would you resolve it?

I will always apply the Constitution, as interpreted by the Supreme Court and the Eighth Circuit, fully and faithfully, without reference to my personal religious, moral, or policy views or to the litigating positions of former clients.

6. You have been a staunch defender of Brett Kavanaugh for his nomination to become a Supreme Court Justice, including defending what you describe as his "clear, consistent, and rock-solid record on the issues that matter most to social conservatives."

Do you believe your legal record is consistent with Brett Kavanaugh's legal record?

I don't think it's possible to compare the "record" of an advocate with that of a judge, because of the aforementioned difference in perspective between those two roles. The above quote is from an op-ed addressing specific criticisms of then-Judge Kavanaugh's record from an identifiable political constituency. As his former clerk, I was more familiar than most with that record, and I wanted to support Judge Kavanaugh, so I published an op-ed explaining and defending his opinions in cases relevant to that audience's concerns. As a judge, I would never be in a position of speaking to the concerns of a specific political constituency about a fellow judge's record or anything else.

7. You have said Justice Brett Kavanaugh "is precisely the sort of justice who will recognize the defects in the Supreme Court's activist abortion jurisprudence."

I have never assured any audience that Justice Kavanaugh would adopt any particular posture toward the Court's abortion jurisprudence or anything else. In every context, I have been very clear that we can count on only one thing from Justice Kavanaugh—that he will make decisions based solely on the law without regard for political outcomes, and that he will respect the constraints on his role as a member of the judiciary.

a. What did you mean by "defects" in the Supreme Court's "activist abortion" decisions?

In the speech referred to here, I was speaking to an audience of attendees at a pro-life conference, who were especially concerned about abortion. Therefore, after spending a great deal of time on Justice Kavanaugh's record of judicial restraint and independence, I pointed out that a judge who follows the law, not politics, is the kind of judge that would recognize past instances of judicial activism, such as those of which critics of the abortion decisions typically complain.

b. Do you believe *Roe v. Wade* and other related cases are defective?

As a judicial nominee, I am prohibited by the Canons of Judicial Conduct from commenting on any decision of the United States Supreme Court, as they are all equally binding on lower court judges, and—if I am fortunate enough to be confirmed—I will apply them all fully and faithfully.

By way of explanation of these particular remarks: I was not referring to any specific decision. I referred in intentionally general terms to a category of concerns that many members of my audience shared about the Supreme Court's decisions relating to abortion. The purpose of using strong terms in describing those concerns was to stress that, however passionately one feels about the subject, one should still favor restrained, non-political judges.

The family of concerns that I described as "activism" boil down to the concern that the Court's abortion jurisprudence goes beyond the judiciary's appropriate role of interpreting the law and instead engages in the legislative function of setting social policy. This criticism does not presume any particular position on the policy issue itself; it is a critique of judicial methodology, not outcome. Accordingly, versions of this critique have been articulated by policymakers, legal academics, and judges whose policy views vary widely.

8. Before Dr. Christine Blasey Ford testified in the Senate about how Brett Kavanaugh tried to rape her in high school, you dismissed the sexual assault allegation as an attempt "to tarnish" Brett Kavanaugh's character with "a single, unsubstantiated, anonymous allegation about an alleged incident in high school – some 35 years ago."

a. Now that Dr. Ford has testified before the Senate Judiciary Committee under oath, do you still believe her sexual assault allegation is a mere "incident"?

My co-author and I used the generic term "incident" to refer to Dr. Ford's allegation when few details were available. The term had no normative significance. Our skepticism in that op-ed was directed at those who appeared to have manipulated the way the allegation had come to light in order to maximize its political impact—not at the anonymous accuser, who had, to that point, declined even to come forward. Our defense of Judge Kavanaugh was then, and has always been, based on his personal integrity and longstanding record of respect for women, including myself and my co-author.

I have never formed any opinion about Dr. Ford herself, and I would not presume to characterize her allegation in any particular way based on the limited evidence available to me. I defer entirely to those who witnessed her live testimony and have access to a more complete evidentiary record as to how they would describe her allegation.

My support for Justice Kavanaugh is rooted in my knowledge of his character and temperament, as a woman who has worked closely with him and has known him for many years.

b. Is it your view that when someone comes forward with an attempted rape allegation many years after the fact, those charges should be taken less seriously?

All allegations of sexual assault should be taken seriously, no matter when they come to light. I have never suggested otherwise.

2018 WL 6042850 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

Kristina BOX, Commissioner of the Indiana State Department of Health, et al., Petitioners,

v.

PLANNED PARENTHOOD OF INDIANA AND KENTUCKY, INC., et al., Respondents.

No. 18-483.
November 15, 2018.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

Brief of the Restoration Project; Pastor Joseph Parker, Pastor of Greater Turner Chapel A.M.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society as Amici Curiae in Support of Petitioners

Thomas L. Brejcha, Sarah E. Pitlyk, Stephen M. Crampton, Thomas More Society, 309 W. Washington Street, Suite 1250, Chicago, Illinois 60606, (312) 782-1680, tbrejcha@thomasmoresociety.org, for amici curiae The Restoration Project; Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society.

*i TABLE OF CONTENTS

*iii TABLE OF AUTHORITIES

Statutes

*1 INTEREST OF THE AMICI CURIAE [1]

[1] Counsel for Petitioners and Respondents received timely notice of amici curiae's intent to file this brief and counsel for Petitioners and Respondents have consented to its filing. Further, as required by Supreme Court Rule 37.6, counsel certifies this brief was not authored, in whole or in part, by counsel to a party, and no monetary contribution to the preparation or submission of this brief was made by any person or entity other than amici curiae, their members, or their counsel.

The Restoration Project ("TRP") is a non-profit organization dedicated to rebuilding families, promoting the sanctity of life, and providing related educational materials, in order to transform American public policy and culture's impact on Black life. TRP works with pastors, ministry leaders and organizations to restore a culture of uprightness, evenhandedness, and virtue.

Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church in Greenwood, MS, has served as a pastor of different congregations for a little more than 40 years. He has been working to stand up for life against abortion for more than 20 years and is disturbed by the abortion industry's deliberate targeting of the African American community.

Everlasting Light Ministries is a comprehensive post-abortion healing and marriage ministry that seeks to heal the massive devastation of abortion and marital discord in America and especially in communities of color; proclaim the truth about abortion and its real life consequences; and sensitize communities to the needs of all post-abortive, post-miscarriage people.

***2 Protect Life and Marriage** Texas works to uphold the Judeo-Christian ethic established by our Founding Fathers in our society with the view of securing liberty for marriages, the American family and the life of the unborn.

The Thomas More Society ("TMS") is a national public interest law firm devoted to restoring respect in the law for life, the family and religious liberty. Based in Chicago, TMS accomplishes its organizational mission through litigation, education, and related activities.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici The Restoration Project, Pastor Joseph Parker, pastor of Greater Turner Chapel A.M.E. Church, Everlasting Light Ministries, Protect Life and Marriage Texas, and the Thomas More Society submit this brief to aid the Court in assessing the gravity of the problem Indiana's HEA 1337 and similar state statutes seek to address. Invidious discrimination in the provision of abortion services is an entrenched and escalating phenomenon. Babies of minority mothers are aborted at a far higher rate than their white counterparts - a disturbing trend that the abortion industry intentionally and unabashedly perpetuates. With recent advances in prenatal testing technology, abortions motivated by the unborn child's gender, disability, and *3 other disfavored genetic traits are also dramatically on the rise.

HEA 1337 and similar state laws are sensible and important legislative responses to racist, sexist, and eugenic practices performed under the guise of "reproductive rights." This Court should grant certiorari in order to reverse the Seventh Circuit and reinstate HEA 1337.

ARGUMENT

I. The Delivery of Abortion Services is Infected with Racial Bias.

A. The origins of abortion are racist and eugenic.

The eugenic origins of the birth-control movement - the progenitor of the abortion rights movement - are well-established. See, *e.g.,* Rebecca A. Messall, *Margaret Sanger and the Eugenics Movement,* Human Life Rev., Spring 2010, at 98 (noting that the founders and early leaders of what became Planned Parenthood were all members of the American Eugenics Society). Margaret Sanger, the founder of the birth control organization that became Planned Parenthood, wrote:

> [T]he example of the inferior classes, the fertility of the feeble-minded, the mentally defective, the poverty-stricken classes, should not be held up for emulation to the mentally and physically fit though less fertile parents of the educated and well-to-do classes. On the *4 contrary, **the most urgent problem today is how to limit and discourage the over-fertility of the mentally and physically defective.**

Margaret Sanger, *The Eugenic Value of Birth Control Propaganda,* Birth Control Rev., XX/XX/1921, at 5, available at https://www.nyu.edu/projects/sanger/web edition/app/documents/show.php?sangerDoc=238946.xml.

Scholars of the history of the eugenics movement acknowledge that Sanger "supported some eugenic aims, and was not above voicing her contempt for the poor, disabled and minorities." Paul A. Lombardo, *Symposium Article: Disability, Eugenics, and the Culture Wars,* 2 St. Louis U. J. Health L. & Pol'y 57, 76 (2008). They also acknowledge that in Planned Parenthood's early advocacy for birth control, "[t]he organization focused on unwanted children and pathological parenting in poor African American communities. ..." Mary Ziegler, 25 Yale J.L. & Feminism 1, 13 (2013); *see also Birth Control or Race Control? Sanger and the Negro Project,* Newsletter #28 (The Margaret Sanger Papers Project, New York University, New York, NY), Fall 2001 (conceding that "the patriarchal racism of the time ... dictated both the Federation's and Sanger's approach to blacks and birth control"), https://www.nyu.edu/projects/sanger/articles/bc_or_race_control.php. To early advocates of birth control and abortion, minority racial groups were among "the mentally and physically defective" whose fertility they sought to limit.

*5 B. The modern abortion industry continues to target ethnic minorities.

Modern advocates of abortion disavow the racism of Planned Parenthood's founders. *See, e.g.,* Now This News, Group Nine Media, Inc., Video: *The History of 100 Years of Women's Health Care at Planned Parenthood,* Jan. 17, 2017, https://www.youtube.com/watch?v=VqYspn7PZmQ (acknowledging that "there's no question that Margaret left behind a conflicting

legacy" but asserting that "*[r]acism and ableism do not have a place at Planned Parenthood and sure as [expletive] don't represent the organization's commitment to equality*").

Demographic data tell a different story. Minority babies in America are at far greater risk from abortion than white babies. In parts of this country, black babies are more likely to be aborted than they are to be born alive. *See, e.g.,* N.Y. State Dep't of Health, Table 23: Induced Abortion and Abortion Ratios by Race/ Ethnicity and Resident County New York State - 2013, Vital Statistics of N.Y. State 2013, *available at* https://www.health.ny.gov/statistics/vital_statistics/2013/table23.htm (noting that in New York City in 2013, 1180 black babies were aborted for every 1000 live births, compared to 240 white babies). In 2014, the rate of abortion among black women was 3.5 times the abortion rate among white women. *See* Tara C. Jatlaoui et al., *Ctrs. for Disease Control & Prevention, Abortion Surveillance - 2014, Morbidity and Mortality Weekly Report,* Vol. 66, No. 24 (Nov. 24, 2017), at 1-48, *available at* https://www.cdc.gov/mmwr/volumes/66/ss/ss6624a1. ***6** htm ("CDC"). In Indiana in 2017, 9.7% of the state population was black but black women had 30.6% of the state's abortions. *See* Indiana State Dep't of Health, Terminated Pregnancy Report 2017 10, *available at* https://www.in.gov/isdh/files/2017%20 Indiana%20Terminated %C20Pregnancy%20Report.pdf; United States Census Bureau, Quick Facts: Indiana, https://www.census.gov/quickfacts/in (last visited Nov. 8, 2018). The numbers are similarly grim for Hispanic babies. *See, e.g.,* N.Y. State Dep't of Health, *supra* (610 Hispanic babies were aborted per 1000 live births in New York City in 2013, compared to 240 white babies).

Abortion advocates contend that preexisting cultural and socioeconomic factors have caused these racial disparities. *See, e.g.,* Preterm, *A Commitment to Racial Justice* (2018), www.preterm.org/racial-justice ("Because of racial injustice, women of color are both more likely to need abortions, and less likely to be able to afford them. For us, reproductive justice includes racial justice."). By the industry's account, its provision of abortion in significantly higher rates to minority women than to white women is a beneficent response to the minority population's greater "need," rather than a function of anything that the abortion industry has done to inflate demand in the minority population. But these claims are belied by the industry's business and marketing practices.

A study based on 2010 Census data reveals that Planned Parenthood has located 79% of its surgical abortion centers within walking distance of ***7** minority-dense neighborhoods. *See* Susan W. Enouen, Life Issues Institute, *New Research Shows Planned Parenthood Targets Minority Neighborhoods,* Life Issues Connector (Oct. 2012), http://www.protectingblacklife.org/ pdf/PP-Targets-10-2012.pdf; *see also* Mark Crutcher et al., Life Dynamics Inc., *Racial Targeting and Population Control* 22, 2011, https://issues4life.org/pdfs/racial_targeting_population_control.pdf (reporting based on census-based study of family planning clinics that "there is not one state in the union without population control centers located in zip codes with higher percentages of blacks and/or Hispanics than the state's overall percentage"). [2]

2 Planned Parenthood tried to counter this analysis of the Census data with a Guttmacher Institute study allegedly finding that only a small percentage of Planned Parenthood clinics are located in "majority-black neighborhoods," but Guttmacher's study was carefully manipulated to produce a misleading result. *See* Willis L. Krumholz, *Yes, Planned Parenthood Targets and Hurts Poor Black Women,* The Federalist, Feb. 18, 2016, http://thefederalist.com/2016/02/18/ yes-planned-parenthood-targets-and-hurts-poor-black-women/ (explaining the defects in the Guttmacher data and its misinterpretation by defenders of Planned Parenthood).

Planned Parenthood claims that locating their clinics near minority communities is part of their outreach to those most in "need" of their services. *See, e.g.,* Hilary Cadigan, *Planned Parenthood moves to EAV,* Creative Loafing, June 16, 2017, https:// creativeloafing.com/content-266693-Planned-Parenthood-moves-to-EAV ("Rollins School of Public Health graduate students from Emory University conducted a relocation analysis to identify strategic locations for the Atlanta ***8** health center. The East Atlanta site is located in an area of need for our sexual and reproductive health services. ..."). But community health centers, which provide medical services to low-income patients, are not similarly concentrated in minority neighborhoods; they perceive needs for their services in other communities as well. *See* Charlotte Lozier Institute, *Maps: Health Clinics Nationwide Compared to Planned Parenthood Centers,* Aug. 21, 2015, https://lozierinstitute.org/health-clinics-nation wide-compared-to-planned-parenthood-centers/. Only a provider that receives the lion's share of its revenues as payment for abortions has made the deliberate strategic choice to locate its surgical abortion clinics near high-density minority communities. Willis L. Krumholz,

Planned Parenthood's Big Bad Business Model, The Federalist, Oct. 27, 2015, http://thefederalist.com/2015/10/27/ planned-parenthoods-big-bad-business-model/ ("revenue from abortion provides the highest profit margins, and is the biggest contributor to [Planned Parenthood] affiliates' total profit").

Since Planned Parenthood began to concentrate its abortion services intentionally in minority communities, the number of minority abortions has dramatically increased while the abortion rate among white women has declined. *See* Susan W. Enouen, Life Issues Institute, *More Evidence Planned Parenthood Markets Abortion to Minorities,* June 14, 2016, https:// www.lifeissues.org/2016/06/pp-markets-abortion-minorities/ ("[F]rom 1990 to 2008, before and after Planned Parenthood's reinvention, the percentage of abortions ***9** received by Black women increased by 9.0%; for Hispanic women it rose 7.6% while the percentage of abortions received by white women declined by 11.1%."). Not coincidentally, during the same interval, Planned Parenthood's revenues have skyrocketed. *See* Willis L. Krumholz, *Guttmacher Erases Data To Protect Planned Parenthood, IUDs,* The Federalist, Apr. 12, 2016, http://thefederalist.com/2016/04/12/ guttmacher-erases-data-to-protect-planned-parenthood-iuds/ (exposing the Guttmacher Institute's manipulation of data to mask the fact that Planned Parenthood had increased its profits by altering its business model in such a way as to bring about a dramatic increase in minority abortion rates).

In addition to deliberately situating their abortion clinics close to minority communities, Planned Parenthood also makes a concerted marketing effort to encourage such communities to avail themselves of its abortion services. For example, Planned Parenthood's "Black Community" Twitter feed makes public statements encouraging black women to support and patronize Planned Parenthood, such as: "If you're a Black woman in America, it's statistically safer to have an abortion than to carry a pregnancy to term or give birth." @PPBlackComm, Twitter, XX/XX/2017, 8:13 AM, https://twitter.com/ppblackcomm/ status/9253803 07242582016?lang=en.

Given its strategic location of abortion clinics near minority neighborhoods and its blatant marketing of abortion to the minority community, the abortion industry's claims to bear no responsibility for the ***10** staggering numbers of minority abortions beggars belief. *See* Crutcher et al., *supra* (noting that "these patterns are routinely considered indicative of racial targeting when it comes to other issues," such as when civil rights advocates criticize tobacco and alcohol companies for concentrating their retail and marketing efforts disproportionately in minority neighborhoods).

C. Socioeconomic factors alone do not explain the different treatment of racial minorities.

Abortion is not the only instance of the medical community treating minority patients differently from their white counterparts. In a 2002 study, the Institute of Medicine ("IOM") found that "[e]vidence of racial and ethnic disparities in healthcare is, with few exceptions, remarkably consistent across a range of illnesses and healthcare services." Inst. of Med., Unequal Treatment: Confronting Racial and Ethnic Disparities in Health Care 5 (2002), *available at* https://www.nap.edu/read/10260/ chapter/1#ii ("IOM"); *see also* Tara Culp-Ressler, *Challenging Medical Racism and Physicians' Preference for White Patients,* Think Progress, Feb. 23, 2015, https://thinkprogress.org/ challenging-medical-racism-and-physicians-preference-for-white-patients-59bec589df88/.

Such disparities are not attributable to socioeconomic differences, the IOM observed: "The majority of studies ... find that racial and ethnic disparities remain even after adjustment for socioeconomic ***11** differences and other healthcare access-related factors." *Id.; see also* Erin Peterson et al., *Why childbirth is a death sentence for many black moms,* Oct. 13, 2018, https://www.11alive.com/article/news/investigations/mothers-matter/ why-childbirth-is-a-death-sentence-for-many-black-moms/85-604079621 ("Black women die at higher rates regardless of their education, how much money they make or preexisting conditions."). Rather, research suggests "that healthcare providers' diagnostic and treatment decisions, as well as their feelings about patients, are influenced by patients' race or ethnicity." IOM, *supra,* at 11. Among other studies, the IOM cited one that "found that doctors rated black patients as less intelligent, less educated, more likely to abuse drugs and alcohol, more likely to fail to comply with medical advice, more likely to lack social support, and less likely to participate in

cardiac rehabilitation than white patients, even after patients' income, education, and personality characteristics were taken into account." IOM, *supra,* at 11.

Planned Parenthood itself has decried the racial disparities in the delivery of healthcare services and has acknowledged that such disparities cannot be explained solely by socioeconomic factors:

> [E]ven after accounting for socioeconomic factors, educated, middle-class Black women were found to be at even higher risk of having smaller, premature babies with a lower chance of survival. A growing body of research is linking racism-related stress and chronic worry about racial discrimination with Black-White ***12** disparities. The U.S. has a legacy of reproductive oppression which may cause some women to delay getting care. And unconscious bias may also play an important role.

Birth Outcome Disparities Among Black Women, Planned Parenthood of the Pacific Southwest, Inc., Blog (Mar. 2, 2018, 11:04 PM), https://www.plannedparenthood.org/planned-parenthood-pacific-southwest/ blog/birth-outcome-disparities-among-black-women.

In Planned Parenthoods's narrative, abortion is always described as part of the *solution* to these disparities - not part of the problem. *See id.* (recommending "reproductive life planning and pre-conception care services offered at [Planned Parenthood]" as part of the path "to better birth outcomes for Black women"); *see also* Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture,* 11 Guttmacher Policy Review 3, Aug. 6, 2008, *available at* https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture. Abortion advocates never acknowledge that the correlation of the concentration of abortion clinics near minority communities with *increasing* unintended pregnancy and abortion *in those same communities* suggests at least that "reproductive life planning" services are not *improving* outcomes for minority women.

In fact, the correlation between increased access to abortion services and poorer health outcomes suggests that the abortion industry is harming those women. Despite the barriers to collecting data about abortion, scientists are increasingly able to document ***13** connections between abortion and the negative health outcomes that afflict minority communities. *See, e.g.,* Brent Rooney et al., *Does Induced Abortion Account for Racial Disparity in Preterm Births, and Violate the Nuremberg Code?,* J. Am. Phys. & Surgeons, Winter 2008, at 102, *available at* http://www.jpands.org/vol13no4/ rooney.pdf (documenting a link between preterm birth and prior induced abortion). Occasionally, extreme instances of such outcomes even appear in the media. *See, e.g.,* Rosemary Parker, *Dead woman's ultrasound showed clot, problems after abortion, records show,* MichiganLive, Apr. 13, 2017, https://www.mlive.com/news/kalamazoo/index.ssf/2017/04/ dead_womans_ultrasound_showed.html (documenting the death of a young black woman after an abortion at Planned Parenthood); Matthew Hay Brown, *Abortion opponents want tighter regulations,* The Baltimore Sun, Mar. 2, 2011, https://www.baltimoresun.com/ bs-mtblog-2011-03-abortion_opponents_want_tighte-story.html (reporting tragic outcomes after abortion, including the death of a young black woman).

Perhaps it is unsurprising that abortion advocates deny that racial bias could infect the abortion industry, but there is no objective reason to doubt that racial bias exists at least as much in that industry as it does everywhere else. Just like other medical treatments, the available data confirm that the racial disparities in the incidence of abortion are not reducible to socioeconomic disparities. There are roughly twice as many poor white women in the United States as there are poor black women, and yet poor black women account ***14** for more of the nation's abortions (14.1%) than poor white women do (11.7%).*See* Rachel K. Jones & Megan L. Kavanaugh, *Changes in Abortion Rates Between 2000 and 2008 and Lifetime Incidence of Abortion,* 117 Obst. & Gyn. 1358-66 (June 2001). Thus, poverty can't be the whole story. Disparities in access cannot be a sufficient explanation either, since Planned Parenthood has made its services even more available to minority populations than to disadvantaged members of other groups, and its efforts have not slowed the increasing rate of minority abortions.

It is widely acknowledged that - consciously or unconsciously - the medical community treats minority patients differently than it treats similarly-situated white patients. There is no reason to believe that there is any *less* racism at work in the abortion context. Moreover, considering the abortion industry's history as an explicitly racist social movement, its unapologetic targeting of minority communities even to this day, and the increasingly poor health outcomes of the communities it claims to serve, there is every reason to believe that racism plays a profound role in the delivery of abortion services. *See* TooManyAborted.com, *The Negro Project,* http://www.toomanyaborted.com/thenegroproject/ (last visited Nov. 13, 2018) (noting the continuing effects of Margaret Sanger's "Negro Project" on today's black communities); Tanya L. Green, *The Negro Project: Margaret Sanger's EUGENIC Plan for Black America,* BlackGenocide.org, http://www.blackgenocide.org/archived_articles/negro.html (last visited Nov. 13, ***15** 2018) (describing the Negro Project and its unfortunate ongoing legacy).

II. Sex-Selection Abortions are a Reality in the United States.

Abortions for the purpose of eliminating a baby of an undesired sex occur frequently in the United States. Because women seeking abortions are not routinely required to declare their motivation, there are no statistics showing precisely how often sex selection is a motive, or the only motive, in seeking an abortion. *See* Sujatha Jesudason & Susannah Baruch, *Sex Selection: What Role for Providers,* 86 Contraception 6, 597 (2012), *available at* https://www.contraceptionjournal.org/article/S0010-7824(12)00796-2/pdf (acknowledging lack of "official data on the frequency of pre- or during-pregnancy sex selection," but provider experience and media coverage indicating it is a common practice). But data from the few groups with a known single-gender preference, widespread acceptance of other types of sex-selective reproductive technology, and mainstream defense of the right to sex-selective abortion all demonstrate that sex-selective abortion is a reality in the United States.

A. Available statistics reflect widespread use of sex-selective abortion.

Sex-selective abortion is not typically detectible in birth rate statistics because it can be used to eliminate either sex, but where a cultural group has a ***16** single-gender preference, the results of sex-selection abortion can be seen in altered sex ratios at birth (SRBs). Studies of data from the "Asian-Pacific" population, which is characterized by "son-preference," from the 2000 census revealed "[n]aturally impossible SRBs within particular ethnic groups. ..." Nicholas Eberstadt, *The Global War Against Baby Girls,* The New Atlantis, Fall 2011, *available at* https://www.thenewatlantis.com/publications/ the-global-war-against-baby-girls. In other words, the sex-ratios at birth of the children of Americans of Asian-Pacific origin were skewed so far from what is naturally possible that the use of sex-selection to avoid the birth of daughters is undeniable. Moreover, the sex-ratios at birth became more sharply distorted among babies later in birth-order, which "strongly suggest[s] that sex-selective abortions were the driver." *Id.;* Jason Abrevaya, *Are There Missing Girls in the United States? Evidence from Birth Data,* 1 Am. Econ. J.: Applied Econ. 2, 1, 3, 7, 15, 25-26 (2009), *available at* https://pdfs.semanticscholar.org/ 8f71/b2fb8f1184351113414f5d4201e02fb70e95.pdf (concluding that Chinese and Indian parents were more likely to have a son at their third and fourth births than the other ethnic groups that were studied); Kelsey Harkness, *Sex Selection Abortions are Rife in the U.S.,* Newsweek, Apr. 14, 2016, *available at* https://www.newsweek.com/sex-selection-abortion-rife-us-447403; *see also* Sunita Puri et al., *"There Is Such a Thing as Too Many Daughters, but Not Too Many Sons": A Qualitative Study of Son Preference and Fetal Sex Selection Among Indian Immigrants in the United States,* 72 Soc. Sci. & Med. 1169 (2011) (study of 65 Indian ***17** immigrant women "found that 40% of the women interviewed had terminated prior pregnancies with female fetuses and that 89% of women carrying female fetuses in their current pregnancy pursued an abortion").

Although statistics can only reflect the practice when there is a single gender preference, there is no reason to believe that only women in cultures with a "son-preference" have availed themselves of sex-selective abortion in the United States. Medical providers in the United States often cater to the preferences of prospective parents to achieve a certain "family balance" in terms of number and gender of children. Jesudason & Baruch, *supra,* at 597 (elaborating on "family balancing" as a motive for sex selection). This "family balancing" motivation for sex-selective abortions exists wherever pre-natal diagnosis and abortion are both available, and its prevalence is evident in the lucrative "reproductive technology" industry.

B. Americans freely make use of reproductive technologies for the purpose of selecting a child of a particular sex.

Although abortions for the purpose of sex-selection are not susceptible to data tracking, it is well established that Americans embrace several other reproductive technologies for the purpose of choosing a future baby's sex, including one that, like abortion, ends the lives of one's own already-conceived genetic offspring. A lucrative industry has developed around ***18** offering prospective parents the ability to select their baby's gender via pre-implantation genetic diagnosis ("PGD"). Jasmeet Sidhu, *How to Buy a Daughter: Choosing the sex of your baby has become a multi-million-dollar industry,* Slate.com, Sept. 14, 2012, *available at* http://www.slate.com/articles/health_and_science/medical_examiner/2012/09/sex_selection_in_babies_through_pgd_americans_are_paying_to_have_daughters_rather_than_sons_.html ("Gender selection now rakes in revenues of at least $100 million every year.").

PGD refers to the testing of embryos generated by in vitro fertilization for particular traits. *Id.* Once the embryos are sorted by trait, parents may choose which to implant in a women's uterus in order to bear a baby with the desired characteristic. PGD is used throughout the world for diagnostic purposes, but the United States is one of the only countries in which PGD is legal for non-medical reasons such as sex-selection. *Id.* ("It is illegal for use for nonmedical reasons in Canada, the U.K., and Australia."); Michelle J. Bayefsky, *Comparative preimplantation genetic diagnosis policy in Europe and the USA and its implications for reproductive tourism,* 3 Reprod. Biomedicine & Soc. Online 41 (2016) ("The USA stands apart in its laissez-faire approach towards the use of PGD."). Accordingly, the United States has become a destination for "medical tourism" in this area.

A 2004 study found that 40% of Americans had no concern about PGD as a means of selecting the gender of future children. Genetics & Public Policy Center, ***19** Reproductive Genetic Testing: What America Thinks 11 (2004), *available at* https://jscholarship.library.jhu.edu/bitstream/handle/1774.2/976/ReproGenTestAmericaThinks.pdf?sequence=1&isAllowed=y. "A 2006 survey by Johns Hopkins University found that 42 percent of fertility clinics offered PGD for gender selection. … [And] that was … before many clinics undertook aggressive online marketing campaigns to drive the demand." Sidhu, *supra; see also* Bayefsky, *supra* ("Elective sex selection is reported to account for 9% of PGD uses in the USA."). PGD is popular with women because unwanted embryos are destroyed prior to implantation in the uterus, which avoids the need for a physically and emotionally taxing abortion. However, PGD is by no means easy: it involves medical procedures to harvest eggs and implant embryos; it is extremely costly; and it does not always yield viable embryos. *See, e.g.,* Sidhu, *supra.*

A less invasive and less costly method of trying to pre-select a baby's sex is "sperm sorting," which involves centrifugally sorting a sperm sample by weight into groups of sperm that are more or less likely to include a Y chromosome, then using a preferred group of sperm for IVF or artificial insemination. World Health Org. Genomic Resource Ctr., *Gender and Genetics: Genetic Technologies for Sex-Selection, Prefertilization,* http://www.who.int/genomics/gender/en/index4.html (last visited Nov. 13, 2018). This method of gender selection is far less invasive than PGD and far less expensive, but it is also far less reliable, with success rates of only 75 to 85%. *Id.*

***20** Sperm sorting is widely available in the United States, but at $1500 per attempt, it is still out of reach to most prospective parents, and, in up to 25% of cases, it yields an unwanted child of the opposite sex. *See id.*; *see also, e.g.,* Sidhu, *supra* (detailing the history of a mother who tried sperm sorting to achieve a female child, conceived a male she considered aborting, then went into debt for two rounds of IVF and PGD).

The demand within the United States for procedures such as PGD and sperm-sorting evidences a societal embrace of using reproductive technology for sex-selection. A culture in which the wealthy are engaging in PGD and sperm-sorting undoubtedly includes many who are pursuing the same result through the less costly means of sex-selective abortion.

C. Unlike most of the world, American abortion activists defend the choice to abort a fetus because of a preference for the other sex.

Fearing any narrowing of a woman's right to choose abortion, abortion proponents in the United States and the United Kingdom openly call for protecting the right to abort because of a preference for one sex or another: "If the U.S. Supreme Court thinks sex selection is sexist, more states will begin to chip away at a woman's reasons for terminating her pregnancy." Sital Kalantry, *Challenging the Narrative on Sex-Selective Abortion Bans,* Ms. Magazine Blog (Aug. 25, 2017). They recognize the inconsistency between ***21** viewing abortion as an absolute right and prohibiting certain reasons for choosing abortion: "Banning sex-selective abortion opens up a world in which there is such thing as a "good" and "bad" reason for an abortion." Pam Lowe, *Why I oppose a ban on sex-selection abortion,* The Conversation, Jan. 26, 2015, http://theconversation.com/why-i-oppose-a-ban-on-sex-selection-abortion-36684. "What could stop a state from banning abortions for reasons the majority regards as "trivial," such as wanting to complete one's education or be successful in a career?" Bonnie Steinbock, *Preventing Sex-Selective Abortions in America: A Solution in Search of a Problem,* The Hastings Center, Apr. 4, 2017, https://www.thehastingscenter.org/ preventing-sex-selective-abortions-america-solution-search-problem/.

Thus, faced with legislation prohibiting sex discrimination by means of sex-selective abortion, even civil rights activists condemn such legislation as a "burden on women obtaining abortions that they want for whatever reason." Kelly P. Kissell, *Arkansas considers banning 'sex-selection' abortions,* APnews.com, Feb. 9, 2017, https://apnews.com/c4c4d2f92b634a8f8e9d31 1b4c385fa9 (quoting Rita Sklar, executive director of Arkansas ACLU). "Once again, the call for government intervention to prevent sex selective abortion conflicts with the preservation of reproductive rights." Daniel Goodkind, Sex-Selective Abortion, Reproductive Rights and the Greater Locus of Gender Discrimination in Family Formation: Cairo's Unresolved Questions 16 (1997), *available at* https://www.psc.isr.umich.edu/pubs/pdf/rr97-383.pdf. "[E]ven the most ***22** terrible reason for having an abortion holds more sway than the best imaginable reason for compelling a woman to carry to term." Sarah Ditum, *Why Women Have a Right to Sex-Selective Abortion,* The Guardian, Sep. 19, 2013, https://www.theguardian.com/commentis free/2013/sep/19/sex-selective-abortion-womans-right.

Given public support for using reproductive technology to choose the gender of born children, as well as cultural defense of sex-selective abortion, and data from son-preferring ethnic groups, it is impossible to deny that abortions for the purpose of sex-selection are routinely being performed in the United States.

III. Abortion for the Purpose of Eliminating a Disabled Person is Commonplace in the United States.

A 2012 study of Down syndrome terminations in the United States demonstrates that prospective parents choose to terminate approximately 67% of fetuses diagnosed prenatally with Down syndrome. J.L. Natoli et al., *Prenatal diagnosis of Down syndrome: a systematic review of termination rates (1995-2011),* 32 Prenatal Diagnosis 142 (2012), *available at* https://www.ncbi.nlm.nih.gov/pubmed/22418958. The number of births of people with Down syndrome in the United States is therefore 30% below natural rates. Gert de Graaf et al., *Estimates of the live births, natural losses, and elective terminations with Down syndrome in the United States,* 167A Am. J. Med. Genetics 756 (2015).

***23** These numbers do not rival the decimation in Down syndrome populations in places like Iceland, where only one or two babies are born with Down syndrome per year, or Denmark, where only four prenatally diagnosed Down syndrome babies were born in 2016. Jerome Lejeune Foundation, *All Danish babies with Down syndrome aborted but 4 in 2016,* Dec. 22, 2017, https://lejeunefoundation.org/denmark-downsyndrome-abortion/. However, the United States' termination rate is sufficient to raise concern, particularly given that Down syndrome is the most common and among the least debilitating of the disorders that can be diagnosed prenatally. Lindsay Abrams, *Prenatal Testing: Earlier and More Accurate Than Ever,* The Atlantic, Nov. 5, 2012, *available at* http://www.theatlantic.com/health/archive/2012/11/ prenatal-testing-earlier-and-more-accurate-than-ever/264472/2/. People with Down syndrome can live lives of ordinary length and function well enough to live independently and be employed. National Down Syndrome Society, *Down Syndrome Facts,* https://www.ndss.org/about-down-

syndrome/down-syndrome-facts/ (last visited Nov. 13, 2018). Though less thoroughly documented, fetuses diagnosed with more debilitating disorders are undoubtedly aborted at higher rates even than 67%. *See, e.g.,* I.C. Lakovschek et al., *Natural outcome of trisomy 13, trisomy 18, and triploidy after prenatal diagnosis,* 155A Am. J. Med. Genetics 2626 (2011) (studying a population of prenatally diagnosed fetuses with triploidy, trisomy 13, and trisomy 18, and finding that 78% of cases were terminated, so only 22% remained for a study of "natural outcomes").

***24** Government has myriad legitimate interests in preventing the termination of disabled fetuses. Disability rights activists argue that aborting a fetus on the basis of disability is the vilest form of disability discrimination, victimizing the disabled "at their most vulnerable stage." Grazie Pozo Christie, *Eugenics and Equality Can't Mix: Aborting babies with detected disabilities is incompatible with equality,* U.S. News & World Report, Aug. 26, 2016, *available at* https://www.usnews.com/opinion/articles/2016-08-26/ eugenic-abortion-is-a-challenge-to-equality-for-people-with-disabilities. In addition to moral concerns, a high rate of terminations raises practical concerns for the future diversity of the United States, because the practice of eliminating disabled people may become self-perpetuating: more terminations of disabled fetuses "could in turn result in increased social pressure to terminate, particularly if the diagnosed conditions were to become rarer in society resulting in a decline of support services (e.g. respite care homes for Down's [sic] Syndrome families). In practice, it could become increasingly difficult for a patient who has received a positive test result not to 'choose' to abort." Caroline Wright, PHG Foundation, Cell-free fetal nucleic acids for non-invasive prenatal diagnosis: report of the uk expert working group 17 (2009), *available at* http://www.phgfoundation.org/documents/214_1260287360.pdf. Moreover, eliminating most people with disabilities raises grave concerns for the lives of those who do live with disabilities. In addition to dwindling support for their unique challenges, increasing rarity and the sense of ***25** disability being "avoidable" is likely to increase the stigma associated with disability. *Id.* at 29.

IV. Eugenic Abortions are Likely to Become More Common in the U.S. As Non-Invasive Prenatal Diagnostic Tools are Increasingly Available and Increasingly Sophisticated.

Compounding the timeless objections to determining which humans will be born based on traits like sex and disability is the strong likelihood that the practice of trait-selective abortion is going to grow exponentially in frequency because of the widespread use of non-invasive prenatal diagnostic ("NIPD") technology. *See* Erin Biba, *This Simple Blood Test Reveals Birth Defects - And the Future of Pregnancy,* Wired Magazine, XX/XX/2012, https://www.wired.com/2012/12/ff-prenatal-testing/; Henry T. Greely, *Get Ready for the Flood of Fetal Gene Screening,* 469 Nature 289, 289 (2011). In the past several years, new NIPD tests have become available, both through providers and over-the-counter, that indicate very early in pregnancy the various genetic features of babies, including sex and disability status. *See, e.g.,* Abrams, *supra;* Carolyn Y. Johnson, *DNA Blood Test Can Detect Prenatal Problems,* Boston Globe, Feb. 26, 2014, *available at* http://www.bostonglobe.com/lifestyle/health-wellness/2014/02/26/ new-study-suggests-prenatal-genetic-tests-could-offered-all-pregnant-women/ V1GQuRL4jkr1M60e1XcQCK/story.html.

***26** The new tests, which evaluate fetal DNA present in the mother's blood, have three major advantages over past methods of prenatal testing: (1) they are noninvasive of the uterus because they require only a maternal blood test, (2) they are increasingly inexpensive as the technology becomes more widespread, and (3) they are accurate very early in pregnancy. Jaime S. King, And *Genetic Testing for All ... The Coming Revolution in Non-Invasive Prenatal Genetic Testing,* 42 Rutgers L. J. 599, 616 (2011). As a result of all of these features, medical and social commentators agree that the incidence of trait-selective abortion is likely to greatly increase in the coming years. *See, e.g.,* Wright, *supra,* at 19 ("The major ethical concern in this area is therefore that prenatal fetal sex determination, in combination with termination of pregnancy, could result in sex selection for non-medical or 'trivial' reasons, which could have major implications for society."); Michael Stokes Paulsen, *It's a Girl,* Public Discourse, Oct. 24, 2011, https://www.thepublicdiscourse.com/ 2011/10/4149/ ("Watch for a spike in abortion rates over the next few years as parents find it easier and cheaper to 'choose' to have a boy by killing the fetus if ... it's a girl").

V. Anti-Discrimination Laws Like HEA 1337 are a Reasonable Legislative Response to Odious Social Practices.

The Court should grant certiorari in order to vindicate states' rights to pass sensible legislation designed to address the troubling phenomenon of ***27** discrimination based on race, gender, and disability in the abortion context. The State of Indiana undeniably has a legitimate interest in trying to end discrimination against racial minorities, the female sex, and disabled persons. There is ample evidence, from this country and others, to support the enactment of legislative prohibitions as one strategy for combating such invidious discrimination.

For example, although racial discrimination in medicine is a complicated issue that defies simple solution, the Institute of Medicine recommended enforcement of anti-discrimination laws as one strategy for addressing it. *See* IOM, *supra,* at 187-88. There is no reason to think that enforcing a prohibition on racial discrimination in the abortion industry would contribute any less to ameliorating the gross racial disparities in that setting.

Meanwhile, as noted above, many countries prohibit sex discrimination in the context of other reproductive technologies. *See supra* Section II.B. Some countries also prohibit sex-selective abortion,[3] while ***28** others are considering banning it.[4] And as Petitioners have pointed out, many other States have already enacted laws banning abortions on the basis of race, gender, or disability. *See* Pet. for Cert, at 25.[5]

3 *See, e.g.,* Chinadaily.com, *China bans selective abortion to fix imbalance,* July 16, 2004, http://www.chinadaily.com.cn/ english/ doc/2004-07/16/content_349051.htm; Arindam Nandi & Anil Deolalikar, *Does a legal ban on sex-selective abortions improve child sex ratios? Evidence from a policy change in India,* 103 J. of Devel. Econ. 216 (2013) (arguing that India's ban on sex-selective abortions has had a positive impact on that country's gender imbalance), *available at* https://econpapers.repec.org/article/ eeedeveco/ v_3a103_3ay_3a2013_3ai_3ac_3ap_3a216-228.htm.

4 *See, e.g.,* Adam Forrest, *Early Gender tests 'leading to selective abortions of girls in UK',* Independent, Sept. 17, 2018, https:// www.independent.co.uk/news/health/ selective-abortions-gender-tests-girls-uk-labour-a8540851.html (discussing a movement in the UK to ban sex-selective abortion).

5 Eight state laws outlawing sex-selective abortion: Ariz. Rev. Stat. Ann. § 13-3603.02; Ark. Code Ann. § 20-16-1904 (eff. Jan. 1, 2018); Kan. Stat. Ann. § 65-6726; N.C. Gen. Stat. § 90-21.121; N.D. Cent. Code § 14-02.1-04.1; Okla. Stat. tit. 63, § 1-731.2; 18 Pa. Cons. Stat. § 3204; S.D. Codified Laws § 34-23A-64. One state law banning abortions on the basis of race: Ariz. Rev. Stat. Ann. § 13-3603.02. Three state laws banning abortions on the basis of genetic abnormality: La. Rev. Stat. Ann. §40:1061.1.2; N.D. Cent. Code §14-02.1-04.1; Ohio Rev. Code Ann. § 2919.10.

Banning abortions on the basis of race, gender, and disability is a prudent - even laudable - step for a legislature seeking to deter increasingly widespread eugenic practices that devalue and disadvantage the most vulnerable members of society. This Court should not permit the Seventh Circuit decision invalidating such a ban to stand.

*29 CONCLUSION

The Supreme Court should grant certiorari in this case in order to reverse the Seventh Circuit and affirm that States may prohibit abortion based on a baby's race, gender, or disability.

Respectfully submitted,

Thomas L. Brejcha

Counsel of Record

Sarah E. Pitlyk

Stephen M. Crampton

Thomas More Society

309 W. Washington Street, Suite 1250

Chicago, Illinois 60606

(312) 782-1680

tbrejcha@thomasmoresociety.org

Counsel for Amici Curiae, The Restoration Project; Pastor Joseph Parker, pastor of Greater Turner Chapel AM.E. Church; Everlasting Light Ministries; Protect Life and Marriage Texas; and the Thomas More Society

November 15, 2018

End of Document

Nomination of Sarah Pitlyk

United States District Court for the Eastern District of Missouri Questions for the Record Submitted October 2, 2019

QUESTIONS FROM SENATOR BOOKER

1. The American Bar Association's Standing Committee on the Federal Judiciary reviewed your application and unanimously rated you "Not Qualified" for the position of federal district judge. The "absence of any trial or even real litigation experience" in your record was an important factor in the ABA's determination that you do "not meet the minimum professional competence standard necessary to perform the responsibilities required by the high office of a federal district court judge."[1]

The ABA's letter states: "Ms. Pitlyk has never tried a case as lead or co-counsel, whether civil or criminal. She has never examined a witness. Though Ms. Pitlyk has argued one case in a court of appeals, she has not taken a deposition. She has not argued any motion in a state or federal trial court. She has never picked a jury. She has never participated at any stage of a criminal matter."[2]

a. Do you dispute any factual claims in the ABA's letter about your lack of experience?

Yes I do. The claim that I lack "any real litigation experience" is a mischaracterization of my background. Over the past 11.5 years, I have represented a wide variety of clients in an even wider variety of litigation matters, from playing a small role as a new associate in giant products liability litigations at Covington to playing a central role in constitutional litigation at the Thomas More Society, and in between working with many different teams of attorneys on a whole range of litigation matters including white collar criminal defense, breach of contract disputes, municipal tax litigation, non-profit corporate governance, open records, RICO, conspiracy, civil and criminal eavesdropping, as well as numerous constitutional matters arising under the First, Fifth, and Sixth Amendments. With respect to these matters, I have litigated issues as mundane as discrete procedural issues in trial court and as momentous as comprehensive dispositive motions and appellate briefing. I have drafted pleadings; developed factual affidavits; attended case status conferences; corresponded with clients, opposing counsel and courts; issued and answered written discovery requests; drafted pretrial evidentiary motions; worked on jury instructions, voir dire questionnaires, and witness examination outlines. I have also briefed all manner of procedural and substantive motions including motions for preliminary injunctions, motions to strike, stay, intervene, compel, transfer, and continue, proposed judgments, as well as dispositive motions and appellate briefs. I argued one of those appeals in the Ninth

[1] Letter from William C. Hubbard, Standing Comm. on the Fed. Judiciary, Am. Bar Ass'n to Chairman Lindsey Graham & Ranking Member Dianne Feinstein, U.S. Senate Comm. on the Judiciary 1-2 (Sept. 24, 2019), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/2019-09-24-re-nomination-of-sarah-pitlyk.pdf.

[2] *Id.* at 1.

Circuit. I have also submitted 10 briefs to the United States Supreme Court in a variety of cases on behalf of a variety of clients. I believe this is all highly relevant to the work of a district judge.

The assertion that I have "never participated at any stage of a criminal matter" also misrepresents my record. The bulk of my experience is in civil litigation but I have worked on several criminal matters. In September I spent a week defending a client in a preliminary hearing in California state criminal court as part of a small litigation team. I had just returned from that hearing when I met with the representative of the ABA. I recounted in detail the scope of my contributions in the context of that hearing—from the preparation of exhibits to the (successful) overnight briefing of an unanticipated motion that implicated critical First and Sixth Amendment rights. I also recounted my contributions to our client's criminal defense over the past year or so in disputes relating to intervention by third parties, the proposed sealing of evidence, and the requirements of the Sixth Amendment in the context of the preliminary hearing. Finally, I told my interviewer about contributions I had made to criminal matters in the past. It was surprising, therefore, to read (in a public letter that many, including members of the Senate Judiciary Committee, will accept as true) that I had "never participated at any stage of a criminal matter."

I acknowledge that there can be good-faith disagreement about whether my particular practice has provided me with the ideal preparation to be a district judge, but I don't think that there is any question that I can—and will—do the job very well. It is true that I have specialized in written legal analysis and that none of my cases has gone to trial (until, coincidentally, this month), but that is typical of complex civil litigation, especially in federal courts. That means that a substantial (and growing) portion of the job of a district judge is also written analysis of legal questions, to which the bulk of my experience is directly relevant. I have, of course, endeavored to learn as much as possible about other aspects of the job of a district judge as I have considered the possibility of taking on that awesome responsibility, and I have concluded that I have all the tools I need to do the job well, most notably: a broad foundation of substantive and procedural expertise; the humility to recognize what I need to learn coupled with the intellect to learn it quickly and well; the work ethic and high standards to ensure excellent work product; and the temperament to conduct a courtroom and chambers with civility and respect for everyone who enters.

b. If you are confirmed, what concrete and affirmative steps would you take to try to overcome the significant experience gap identified by the ABA?

One very attractive aspect of the job of a district judge is the substantive breadth of the docket. I began preparing for that broadening of scope as soon as I was asked to consider submitting my name for consideration, paying special attention to areas of law in which I have not specialized. Over the past several months, I have spoken to many judges (district, magistrate, and appellate), litigators (civil and criminal), law clerks, interns, judicial assistants, and other courthouse personnel. I have reviewed resources they recommended (and in some cases generously given me), as well as other books and

resources I have identified through independent research. I have studied rules and treatises and outlines and hornbooks. And I have attended a number of courtroom proceedings, observing the practices of different judges in a variety of contexts. I have paid special attention to trial practice, criminal procedure, and the Federal Rules of Evidence, but I have also reviewed the Federal Rules of Civil Procedure and reviewed fundamental jurisprudential principles and canons of statutory and constitutional interpretation.

If I am confirmed, I anticipate continuing all of these educational efforts until well after I have taken the bench. If what current district judges tell me is true, I expect to continue learning until the day I retire (another very appealing aspect of the job). Fortunately, the Eastern District of Missouri is famously humane and hands-on in the training new judges, and I look forward to taking advantage of the advice and counsel of so many capable colleagues.

2. In addition to what the ABA described as "the short time [you have] actually practiced law and [your] lack of litigation, trial, and courtroom experience,"[3] you have also acknowledged that only 5 percent of your work has involved criminal matters.[4] Again, as the ABA noted, you have "never participated at any stage of a criminal matter."[5]

District court judges handle a vast array of criminal matters. Given your lack of experience in criminal cases, what concrete and affirmative steps would you take if confirmed to learn more about how to handle this significant portion of your docket?

See my answers to 1.a and 1.b for clarification of the ABA's statements. With respect to criminal matters in particular, I have of course made an effort to learn those aspects of the Federal Rules of Criminal Procedure and Federal Rules of Evidence that I have not had occasion to learn in my predominantly civil practice. In particular, I've sought out resources designed for trial practitioners addressing how to apply the rules in practice. I have also begun to prepare myself for conducting criminal proceedings by observing sentencings, pleas, detention hearings, and criminal trials. And I have spoken to members of the Eastern District about the process of training new judges for conducting various kinds of proceedings. I plan to be thoroughly prepared before I preside over any courtroom proceeding, but I take that obligation especially seriously in criminal matters, in which a defendant's personal liberty is at stake.

3. An amicus brief you filed before the Supreme Court in *Schuette v. Coalition to Defend Affirmative Action* argued that race-conscious admissions programs "actually harm their intended beneficiaries by systematically mismatching minority students with programs where their risk of underperformance is heightened."[6] Please explain your argument that race-

---

[3] *Id.* at 2.

[4] SJQ at 17-18.

[5] Letter, *supra* note 1, at 1.

[6] Brief for the Am. Civil Rights Union & the Am. Civil Rights Inst. as Amici Curiae in Support of Petitioner at 5,

conscious admissions programs "systematically mismatch[] minority students."

This question refers to a single paragraph in a joint-authored amicus brief filed more than six years ago on a subject I have not had occasion to revisit since. As such, I can offer no context beyond the text of the argument itself.

4. Impartiality is a fundamental part of a federal judge's duties. Impartiality is central to the rule of law and judicial independence. Canon 3 of the Code of Conduct for United States Judges instructs: "A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently." Canon 3(C), moreover, specifically provides: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."

You have taken a variety of positions opposing women's reproductive rights. For example, an amicus brief you filed before the Supreme Court in *Sebelius v. Hobby Lobby Stores, Inc.* stated that the Affordable Care Act's contraceptive-coverage mandate "require[d] religiously objecting employers to cooperate in the grave moral wrong" involving "their employees' actual use of abortifacients and contraceptives."[7] Another amicus brief you filed before the Supreme Court stated that the "modern abortion industry continues to target ethnic minorities" and described "the abortion industry's history as an explicitly racist social movement."[8]

To take another example, in a speech earlier this year you described Justice Kavanaugh as "precisely the sort of justice who will recognize the gross defects in the Supreme Court's thoroughly activist abortion jurisprudence, and given the opportunity, will remedy them. It is the kind of the judge who does not deliver politically biased decisions like the ones that we have seen our pro-life clients suffer time and time again. Therefore, it is precisely the sort of justice that those of us in this room should want."[9]

And in an article you published last year while then-Judge Kavanaugh was under consideration for a seat on the Court, you wrote, "On the vital issues of protecting religious liberty and enforcing restrictions on abortion, no court of appeals judge in the nation has a stronger, more consistent record than Judge Brett Kavanaugh."[10] You also stated that his "record on issues of

---

Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2013), 2013 WL 3362089, at *5.

[7] Brief of 67 Catholic Theologians & Ethicists as Amici Curiae in Support of Hobby Lobby Stores, Inc., and Conestoga Wood Specialties Corp. at 7, *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), 2014 WL 316716, at *7.

[8] Brief of the Restoration Project et al. as Amici Curiae in Support of Petitioners at 14, *Box v. Planned Parenthood of Ind. & Ky.*, No. 18-483 (Nov. 15, 2018), 2018 WL 6042850, at *14.

[9] Sarah Pitlyk, Remarks at the Law of Life Summit, Defending Life: From the Sidewalks up to the U.S. Supreme Court (Jan. 17, 2019), *in* SJQ Attachments at 144.

[10] Sarah Pitlyk, *Judge Brett Kavanaugh's Impeccable Record of Constitutional Conservatism,* NAT'L REV. (July 3, 2018), https://www.nationalreview.com/2018/07/judge-brett-kavanaughs-impeccable-record-of-constitutional-conservatism.

concern to social conservatives is rock solid."[11]

a. In what ways is the Supreme Court's current case law on abortion "thoroughly activist"?

As a judicial nominee, I am prohibited by the Canons of Judicial Conduct from evaluating any decision of the United States Supreme Court, as they are all equally binding on lower court judges, and—if I am fortunate enough to be confirmed—I will apply them all fully and faithfully.

As for the remark excerpted here, I was not referring to any specific decision. This is an excerpt from a presentation about Justice Kavanaugh to an audience of pro-life activists, in which I argued that they should not look to the newly-confirmed Justice (or any other judge, for that matter) to deliver policy outcomes they would prefer but rather they should be hoping for him (and all judges) to make decisions governed strictly by what the law requires, leaving the legislating to the democratically-elected branches. I pointed out that Justice Kavanaugh is just such a judge, so they could not necessarily rely on him for "pro-life" outcomes, but they could rely on him for principled decisions that do not reach beyond the proper role of a judge, which is what everyone who cares about democracy and the rule of law should want.

Given the brevity and purpose of my remarks, I referred in intentionally general terms to a category of concerns that many members of my audience shared about the Supreme Court's decisions relating to abortion. The purpose of using strong terms in describing those concerns was to stress that, however passionately one feels about the subject, one should still favor restrained, non-political judges.

The family of concerns that I described as "activism" boil down to the concern that the Court's abortion jurisprudence goes beyond the judiciary's appropriate role of interpreting the law and instead engages in the legislative function of setting social policy. This criticism does not presume any particular position on the policy issue itself; it is a critique of judicial methodology, not outcome. Accordingly, versions of this critique have been articulated by policymakers, legal academics, and judges with a wide variety of policy views on abortion.

b. What are the "gross defects" in the Supreme Court's current case law on abortion?

Please see my answer to Question 4.a. As noted above, I briefly addressed well-known concerns about the Supreme Court's abortion jurisprudence, suggesting that restrained judges are not just ideal as a matter of constitutional principle; they are also the kind of judge who will resist and, where appropriate remedy judicial activism of the kind pro-life activists typically object to in the Court's abortion cases—again, thereby leaving policy decisions up to the policy-makers. I did not discuss or refer to specific "defects." My description of this whole family of objections was brief and overly simplistic. What

[11] *Id.*

I was trying to convey was that, however aggrieved the audience members may feel by the Court's abortion jurisprudence, the solution is not judicial activism in a different political direction but rather judicial restraint.

As a judge, it would never be my role to speak to the concerns of a particular political constituency about Supreme Court jurisprudence or anything else. I am very well aware of the difference between an advocate and a judge, and I will take my oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" very seriously. 28 U.S.C. § 453.

b. In what ways do you believe that your "pro-life clients" have received "politically biased decisions"?

As advocates for pro-life clients, members of my firm have had occasion to question whether decisions in some of our cases have been colored by bias against pro-life activists. I wasn't referring to any particular instance of that phenomenon and do not think it is consistent with my obligations to my clients to disclose details of individual cases in this context.

c. Why, in your view, is a "rock solid" "record on issues of concern to social conservatives," such as "enforcing restrictions on abortion," an important qualification for a seat on the nation's highest court?

This is an excerpt from an op-ed published before then-Judge Kavanaugh was nominated to the Supreme Court, in response to certain specific criticisms that had been leveled at his judicial record from an identifiable political constituency. As his former clerk, I was more familiar than most with that record, and I wanted to support Judge Kavanaugh however I could, so I published an op-ed explaining and defending his opinions in relevant cases. As a judge, of course, I would never be in the position of arguing in support of (or opposition to, for that matter) any nominee to the judiciary, nor of speaking to the concerns of any specific political constituency about a prospective Supreme Court justice or anything else. And it would be improper for me to do so as a judicial nominee. *See* Canon 5, Code of Conduct for United States Judges (prohibiting political activity).

e. You said in a July 2018 interview that when judges "start making decisions based on what outcome they'd prefer, then you have unelected judges replacing the will of the people with their own judgment."[12] And yet at the same time you were supporting then-Judge Kavanaugh based in part on preferred judicial outcomes for "issues of concern to social conservatives." Weren't you endorsing precisely this kind of outcome-driven judging on issues such as women's reproductive rights?

Please see my answer to Question 4.d.

---

[12] *A Closer Look with Sheila Liaugminas*, RELEVANT RADIO (July 17, 2018), https://relevantradio.com/2018/07/a- closer-look-with-sheila-liaugminas-july-17-2018.

f. Do you believe that *Roe v. Wade* was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

As a judicial nominee, I am prohibited by the Canons of Judicial Conduct from commenting on any decision of the United States Supreme Court, as they are all equally binding on lower court judges, and it would degrade public confidence in the impartiality of the judiciary if lower court judges were to give the impression that they regard some precedents as more or less authoritative than others. *See* Canon (2)(a), Code of Conduct for United States Judges (admonishing judges and judicial nominees to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary"). As a district judge, I would apply *Roe v. Wade* and all of the Supreme Court's abortion-related precedents fully and faithfully.

g. If you are confirmed, why should a litigant in your courtroom expect to get a fair hearing from an impartial judge in a case involving abortion rights, in light of statements like these?

Nothing I have ever said or done should cast doubt on my ability to apply the law fully and faithfully. I have never advocated disobedience to any law. I have never argued that a lower court judge should flout a precedent of a higher court. I have never made arguments that are radical or unsupported by evidence and/or precedent.

Nor is there any reason to suspect that I would not give every litigant in my courtroom a full and fair hearing. I have never treated anyone unfairly, or even with incivility, because of their policy views about abortion or anything else. On the contrary, my resume and letters of support demonstrate that I have developed respectful and collegial relationships with people of all political points of view in every phase of my career.

Representing clients who support certain policy positions does not disqualify an advocate from ever hearing cases that relate to that policy issue as a judge. If it did, then Justice Ginsburg would have to recuse from all cases involving gender discrimination, for example, which no one would suggest. The role of a judge is different from that of an advocate, obviously, but that does not mean that the same person cannot be capable of doing both well; if it did, the country would be bereft of judges.

h. As noted, the Code of Conduct for United States Judges requires a judge to "disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Given your extensive record on reproductive rights, wouldn't your impartiality on this issue reasonably be questioned, such that your recusal would be warranted?

I will apply every decision of the United States Supreme Court and the United States Court of Appeals for the Eighth Circuit fully and faithfully. As noted above in response to Question 4.g, I know of no reason that anyone should doubt my impartiality in applying precedents relating to reproductive rights or any other issue. I fully

comprehend the difference between the role of an advocate and the role of a judge, and—if I am confirmed—I will take my oath to "faithfully and impartially discharge and perform all the duties incumbent upon me" very seriously. 28 U.S.C. § 453.

Because every recusal decision is fact-specific, I don't think it is possible assess the issue hypothetically, but I will recuse from any case in which my impartiality "might reasonably be questioned," as required by 28 U.S.C. § 455(a), and in any of the circumstances specifically prescribed by 28 U.S.C. § 455(b). In response to any party's concern about my impartiality, I will carefully consult all relevant rules and precedents, and I will confer with both parties, with my chief judge and colleagues, and, if necessary, with the Administrative Office for the U.S. Courts and/or other ethics counsel.

5. Do you consider yourself an originalist? If so, what do you understand originalism to mean?

I would not describe myself as exclusively an "originalist" or "textualist," especially since the meanings of those terms are contested. I do believe that it's appropriate to consider the original public meaning of constitutional and statutory texts when interpreting and applying them. The Supreme Court has examined the original meaning when interpreting texts in certain contexts. The Supreme Court has also repeatedly stated that statutory interpretation begins with the text, and where the text is clear, that is the end of the inquiry. If confirmed, I will fully and faithfully apply all Supreme Court and Eighth Circuit precedent, including precedent concerning the appropriate modes of constitutional and statutory interpretation.

6. Do you consider yourself a textualist? If so, what do you understand textualism to mean?

Please see my response to question 5.

7. Legislative history refers to the record Congress produces during the process of passing a bill into law, such as detailed reports by congressional committees about a pending bill or statements by key congressional leaders while a law was being drafted. The basic idea is that by consulting these documents, a judge can get a clearer view about Congress's intent. Most federal judges are willing to consider legislative history in analyzing a statute, and the Supreme Court continues to cite legislative history.

a. If you are confirmed to serve on the federal bench, would you be willing to consult and cite legislative history?

The Supreme Court has relied upon legislative history in certain contexts. *See, e.g.*, *Matal v. Tam*, 137 S. Ct. 1744, 1756 (2017). If confirmed, I would faithfully apply the precedents of the Supreme Court, including both the outcomes the Supreme Court reached and the methods of interpretation that the Supreme Court used to reach those outcomes in those contexts.

b. If you are confirmed to serve on the federal bench, your opinions would be subject to review by the Supreme Court. Most Supreme Court Justices are willing to

consider legislative history. Isn't it reasonable for you, as a lower-court judge, to evaluate any relevant arguments about legislative history in a case that comes before you?

Please see my response to question 7.a.

8. Do you believe that judicial restraint is an important value for a district judge to consider in deciding a case? If so, what do you understand judicial restraint to mean?

It is important for a judge to decide cases based solely on the applicable law, leaving policy decisions to the elected political branches.

a. The Supreme Court's decision in *District of Columbia v. Heller* dramatically changed the Court's longstanding interpretation of the Second Amendment.[13] Was that decision guided by the principle of judicial restraint?

The Supreme Court's decision in *Heller* is binding precedent on the lower courts. Consistent with the canons of judicial conduct, it would not be appropriate for me to grade prior Supreme Court decisions. If confirmed, I would faithfully apply the precedents of the Supreme Court. *See* Canons 1 and 3, Code of Conduct for United States Judges.

b. The Supreme Court's decision in *Citizens United v. FEC* opened the floodgates to big money in politics.[14] Was that decision guided by the principle of judicial restraint?

Please see my response to question 8.a.

c. The Supreme Court's decision in *Shelby County v. Holder* gutted Section 5 of the Voting Rights Act.[15] Was that decision guided by the principle of judicial restraint?

Please see my response to question 8.a.

9. In a 2013 interview with NPR, you spoke about a North Carolina's voter ID law.[16] In the interview you seem to suggest that you supported the law as long as it was implemented correctly. Since the Supreme Court's *Shelby County* decision in 2013, states across the country have adopted restrictive voting laws that make it harder for people to vote. From stringent voter ID laws to voter roll purges to the elimination of early voting, these laws disproportionately disenfranchise people in poor and minority communities. These laws are often passed under the guise of addressing purported widespread voter fraud. Study after study has demonstrated,

---

[13] 554 U.S. 570 (2008).

[14] 558 U.S. 310 (2010).

[15] 570 U.S. 529 (2013).

[16] NPR, *supra* note 6.

however, that widespread voter fraud is a myth.[17] In fact, in-person voter fraud is so exceptionally rare that an American is more likely to be struck by lightning than to impersonate someone at the polls.[18]

a. Did you support North Carolina's 2013 voter ID law? If so, please explain why you supported the law.

b. Do you believe that in-person voter fraud is a widespread problem in American elections?

c. In your assessment, do restrictive voter ID laws suppress the vote in poor and minority communities?

d. Do you agree with the statement that voter ID laws are the twenty-first-century equivalent of poll taxes?

I am unfamiliar with the basis for these questions. I did not participate in an interview with NPR in 2013.

10. According to a Brookings Institution study, African Americans and whites use drugs at similar rates, yet blacks are 3.6 times more likely to be arrested for selling drugs and 2.5 times more likely to be arrested for possessing drugs than their white peers.[19] Notably, the same study found that whites are actually *more likely* than blacks to sell drugs.[20] These shocking statistics are reflected in our nation's prisons and jails. Blacks are five times more likely than whites to be incarcerated in state prisons.[21] In my home state of New Jersey, the disparity between blacks and whites in the state prison systems is greater than 10 to 1.[22]

a. Do you believe there is implicit racial bias in our criminal justice system?

Yes.

b. Do you believe people of color are disproportionately represented in our nation's

---

[17] *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth.

[18] *Id.*

[19] Jonathan Rothwell, *How the War on Drugs Damages Black Social Mobility*, BROOKINGS INST. (Sept. 30, 2014), https://www.brookings.edu/blog/social-mobility-memos/2014/09/30/how-the-war-on-drugs-damages-black-social-mobility.

[20] *Id.*

[21] Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons.

[22] *Id.*

jails and prisons?

Yes.

c. Prior to your nomination, have you ever studied the issue of implicit racial bias in our criminal justice system? Please list what books, articles, or reports you have reviewed on this topic.

I have not studied the issue in detail, but I am generally familiar with the issue of implicit racial bias in our criminal justice system. I do not have a record of the sources I have read on the subject.

d. According to a report by the United States Sentencing Commission, black men who commit the same crimes as white men receive federal prison sentences that are an average of 19.1 percent longer.[23] Why do you think that is the case?

I am familiar with the findings of the Sentencing Commission in that report with respect to the rates of downward departures and variances. I do not have the relevant expertise to offer an independent assessment of the reasons for that phenomenon.

e. According to an academic study, black men are 75 percent more likely than similarly situated white men to be charged with federal offenses that carry harsh mandatory minimum sentences.[24] Why do you think that is the case?

Please see my response to question 10.d.

f. What role do you think federal district judges, who review difficult, complex criminal cases, can play in addressing implicit racial bias in our criminal justice system?

A judge must ensure fairness, equality, and impartiality in all criminal proceedings, and must approach each case with mindfulness and vigilance with respect to potential implicit biases of any kind.

11. According to a Pew Charitable Trusts fact sheet, in the 10 states with the largest declines in their incarceration rates, crime fell by an average of 14.4 percent.[25] In the 10 states that saw

---

[23] U.S. SENTENCING COMM'N, DEMOGRAPHIC DIFFERENCES IN SENTENCING: AN UPDATE TO THE 2012 *BOOKER* REPORT 2 (Nov. 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research- publications/2017/20171114_Demographics.pdf.

[24] Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1323 (2014).

[25] Fact Sheet, *National Imprisonment and Crime Rates Continue To Fall*, PEW CHARITABLE TRUSTS (Dec. 29, 2016), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2016/12/national-imprisonment-and-crime-rates-continue-to-fall.

the largest increase in their incarceration rates, crime decreased by an average of 8.1 percent.[26]

a. Do you believe there is a direct link between increases in a state's incarcerated population and decreased crime rates in that state? If you believe there is a direct link, please explain your views.

I have not studied that issue well enough to develop a view about this issue.

b. Do you believe there is a direct link between decreases in a state's incarcerated population and decreased crime rates in that state? If you do not believe there is a direct link, please explain your views.

Please see my response to question 11.a.

12. Do you believe it is an important goal for there to be demographic diversity in the judicial branch? If not, please explain your views.

Yes.

13. Would you honor the request of a plaintiff, defendant, or witness in a case before you who is transgender to be referred to in accordance with that person's gender identity?

Yes.

14. Do you believe that *Brown v. Board of Education*[27] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

Yes. Because of the unique place that *Brown v. Board of Education*, 347 U.S. 483 (1954), holds in our constitutional history, I believe that it is important for me to affirm that I believe that it was correctly decided.

15. Do you believe that *Plessy v. Ferguson*[28] was correctly decided? If you cannot give a direct answer, please explain why and provide at least one supportive citation.

No. *Brown v. Board of Education*, 347 U.S. 483 (1954), correctly overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896).

16. Has any official from the White House or the Department of Justice, or anyone else involved in your nomination or confirmation process, instructed or suggested that you not opine on whether any past Supreme Court decisions were correctly decided?

---

[26] *Id.*

[27] 347 U.S. 483 (1954).

[28] 163 U.S. 537 (1896).

My responses are my own. In responding to questions at my hearing and in writing, I have been mindful of the precedent set by prior judicial nominees who have generally declined to comment on the wisdom of past Supreme Court decisions but have sometimes recognized an exception for *Brown v. Board of Education*. Lawyers at the Department of Justice have provided general guidance on questions that have been asked of other nominees and on the Code of Conduct for United States Judges.

17. As a candidate in 2016, President Trump said that U.S. District Judge Gonzalo Curiel, who was born in Indiana to parents who had immigrated from Mexico, had "an absolute conflict" in presiding over civil fraud lawsuits against Trump University because he was "of Mexican heritage."[29] Do you agree with President Trump's view that a judge's race or ethnicity can be a basis for recusal or disqualification?

Consistent with the Code of Judicial Conduct, it would not be appropriate for me to comment on political statements by the President. *See* Canon 5, Code of Conduct for United States Judges; *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

18. President Trump has stated on Twitter: "We cannot allow all of these people to invade our Country. When somebody comes in, we must immediately, with no Judges or Court Cases, bring them back from where they came."[30] Do you believe that immigrants, regardless of status, are entitled to due process and fair adjudication of their claims?

The Supreme Court has stated that "the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). If confirmed, I would faithfully apply this binding precedent of the Supreme Court.

---

[29] Brent Kendall, *Trump Says Judge's Mexican Heritage Presents 'Absolute Conflict,'* WALL ST. J. (June 3, 2016), https://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442.

[30] Donald J. Trump (@realDonaldTrump), TWITTER (June 24, 2018, 8:02 A.M.), https://twitter.com/realDonaldTrump/status/1010900865602019329.

Questions for the Record from Senator Kamala D. Harris
Submitted October 2, 2019
For the Nomination of
Sarah E. Pitlyk, to the U.S. District Court for the Eastern District of Missouri

1. In 2013, Texas passed House Bill 2, which imposed restrictions on health care facilities that provided access to abortions. After the law passed, the number of those health care facilities dropped in half, from about 40 to about 20, severely limiting access to health care for the women of Texas. In *Whole Woman's Health*, the Supreme Court struck down two provisions of the Texas law based on its overall impact on abortion access in the state.

a. **Was *Whole Woman's Health* correctly decided?**

As a nominee to a lower court, it would be improper for me to grade or otherwise evaluate decisions of the Supreme Court. If confirmed, I would faithfully apply all binding Supreme Court precedent, including *Whole Woman's Health*. *See* Canons 1 and 3, Code of Conduct for United States Judges; *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

b. **Did the Court in *Whole Woman's Health* change or clarify the "undue burden" test used to evaluate laws restricting access to abortion? If so, how?**

The application of the "undue burden" test under *Whole Woman's Health* is a subject that is pending or impending in federal courts. As such, it is improper under the Canons of Judicial Conduct for me to comment on it. *See* Canon 3(a)(6), Code of Conduct for United States Judges ("A judge should not make public comment on the merits of a matter pending or impending in any court."); *id.* Canon 1 commentary ("The Code is designed to provide guidance to judges and nominees for judicial office.").

c. **When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law would disproportionately affect poor women?**

Please see my response to Question 1.b.

d. **When determining whether a law places an undue burden on a woman's right to choose, do you agree that the analysis should consider whether the law has an overall impact of reducing abortion access statewide?**

Please see my response to Question 1.b.

2. District court judges have great discretion when it comes to sentencing defendants. It is important that we understand your views on sentencing, with the appreciation that each case would be evaluated on its specific facts and circumstances.

a. **What is the process you would follow before you sentenced a defendant?**

I would follow the process set forth by the Supreme Court and the Eighth Circuit. In *United States v. Feemster*, 572 F.3d 455, 460-61 (8th Cir. 2009) (en banc), the en banc Eighth Circuit established the procedure for a district court to employ in imposing a sentence:

(1) Correctly calculate the applicable Guidelines range.

(2) Give both parties an opportunity to argue for the sentence they deem appropriate.

(3) Consider all of the § 3553(a) factors to determine whether they support the sentence requested, without presuming that the Guidelines range is reasonable and making an individualized assessment based on the facts presented.

(4) If a sentence outside of the Guidelines range is warranted, provide a justification sufficiently compelling to support the degree of the variance.

(5) After determining an appropriate sentence, adequately explain it to allow for meaningful appellate review and to promote the perception of fair sentencing.

I would also take into account factors such as the indictment, pre-sentence investigation report, sentencing memoranda and any statements by the defendant and victim(s).

b. **As a new judge, how do you plan to determine what constitutes a fair and proportional sentence?**

I would apply the law of the Supreme Court and Eighth Circuit, as set forth in Question 2.a. In addition, I would carefully study resources regarding sentencing published by the U.S. Sentencing Commission and examine statistics relating to sentences of the Eastern District of Missouri and other districts.

c. **When is it appropriate to depart from the Sentencing Guidelines?**

Federal Sentencing Guidelines provide guidance as to the circumstances when a departure from the ranges set forth in the Guidelines is appropriate. *See* Federal Sentencing Guidelines, Chapter 5. If confirmed, I would follow the direction of the Sentencing Guidelines regarding departures and the guidance of the Supreme Court and the Eighth Circuit.

d. Judge Danny Reeves of the Eastern District of Kentucky—who also serves on the U.S. Sentencing Commission—has stated that he believes mandatory minimum sentences are more likely to deter certain types of crime than discretionary or indeterminate sentencing.[1]

---

[1] https://www.judiciary.senate.gov/imo/media/doc/Reeves%20Responses%20to%20QFRs1.pdf

i. **Do you agree with Judge Reeves?**

I have not studied issues regarding mandatory minimum sentences and am not, therefore, equipped to render an opinion on this issue. In addition, as a judicial nominee, I believe that providing such an opinion would be inappropriate because this issue involves the consideration of matters of policy. If confirmed, I will fully and faithfully comply with all applicable statutes and precedent.

ii. **Do you believe that mandatory minimum sentences have provided for a more equitable criminal justice system?**

Please see my response to Question 2.d.i.

iii. **Please identify instances where you thought a mandatory minimum sentence was unjustly applied to a defendant.**

Please see my response to Question 2.d.i.

iv. Former-Judge John Gleeson has criticized mandatory minimums in various opinions he has authored, and has taken proactive efforts to remedy unjust sentences that result from mandatory minimums.[1] **If confirmed, and you are required to impose an unjust and disproportionate sentence, would you commit to taking proactive efforts to address the injustice, including:**

1. **Describing the injustice in your opinions?**

As a judicial nominee, I do not believe that it is appropriate to commit to taking any specific course of action in rendering a decision or imposing a sentence, other than to apply the law as set forth by Congress and applicable precedent. In addition, I believe that separation of powers principles require a judge to avoid taking a position on the wisdom of, or other policy considerations relating to, a statute—matters that are left to the authority of Congress.

2. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss their charging policies?**

Please see my response to Question 2.d.iv.1.

3. **Reaching out to the U.S. Attorney and other federal prosecutors to discuss considerations of clemency?**

Please see my response to Question 2.d.iv.1.

---

[1] *See, e.g.*, "Citing Fairness, U.S. Judge Acts to Undo a Sentence He Was Forced to Impose," NY Times, July 28, 2014, https://www.nytimes.com/2014/07/29/nyregion/brooklyn-judge-acts-to-undo-long-sentence-for-francois-holloway-he-had-to-impose.html

e. 28 U.S.C. Section 994(j) directs that alternatives to incarceration are "generally appropriate for first offenders not convicted of a violent or otherwise serious offense." **If confirmed as a judge, would you commit to taking into account alternatives to incarceration?**

If confirmed, I would consider all options permitted by statute and set forth in the sentencing guidelines, including alternatives to incarceration.

3. Judges are one of the cornerstones of our justice system. If confirmed, you will be in a position to decide whether individuals receive fairness, justice, and due process.

a. **Does a judge have a role in ensuring that our justice system is a fair and equitable one?**

Yes.

b. **Do you believe there are racial disparities in our criminal justice system? If so, please provide specific examples. If not, please explain why not.**

Yes. I am aware, for example, of the disproportionate number of people of color who are serving time in our nation's prisons and jails.

4. If confirmed as a federal judge, you will be in a position to hire staff and law clerks.

a. **Do you believe it is important to have a diverse staff and law clerks?**

Yes.

b. **Would you commit to executing a plan to ensure that qualified minorities and women are given serious consideration for positions of power and/or supervisory positions?**

If confirmed, I will make hiring decisions on a case-by-case basis. In doing so, I will be sensitive to the interest of diversity and welcome opportunities to hire and promote women and minority candidates.