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Hearing of the House Judiciary Committee, Subcommittee on the Constitution
Regarding H.R. 3541, the Prenatal Nondiscrimination Act

December 6, 2011
1:00 p.m.
2141 Rayburn Building



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December 6, 2011

Hon. Lamar S. Smith, Chair
Hon. John Conyers, Jr., Ranking Member
Honorable Members
United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution
2138 Rayburn House Office Building
Washington, DC 20515-6216

Mr. Chairman, Mr. Conyers and Members of the Subcommittee:

I am deeply privileged to have been asked by the Subcommittee to testify today regarding the constitutionality of the Prenatal Nondiscrimination Act of 2011, H.R. 3541. This bill is appropriately named for two great champions of human equality, the suffragist Susan B. Anthony and the abolitionist Frederick Douglass. Susan B. Anthony was a moving force behind the extension of the voting franchise to women, for whom the right to life was an indispensable aspect of the right of equality. Anthony observed, "When a woman destroys the life of her unborn child, it is a sign that, by education or circumstances, she has been greatly wronged."¹ Frederick Douglass, born a slave, became perhaps the most influential black spokesman for emancipation and citizenship of the antebellum era through his newspaper, *The North Star*, founded in 1847. On the masthead of the newspaper was emblazoned the motto: "Right is of no sex; truth is of no color, God is the Father of us all - and all are brethren."

H.R. 3541 would prohibit the practice of abortion committed by reason of the gender or race of the preborn patient.² Gender, and the many physical qualities that are construed as "race," are immutable human genetic qualities that exist at conception, like a myriad characteristics that are woven together in the womb to create each unique member of the human

¹ See <http://womenshistory.about.com/od/anthonysusanb/a/anthony.htm>.

² A physician treating a pregnant mother has two patients, the maternal patient and the fetal patient and owes duties of care to each. L.B. MCCULLOUGH AND F.A. CHERVENAK, *ETHICS IN OBSTETRICS AND GYNECOLOGY* (Oxford University Press New York 1994); D.W. Bianchi, *et al.*, *FETOLOGY: DIAGNOSIS AND MANAGEMENT OF THE FETAL PATIENT* (McGraw Hill New York 2000).

species.³ Federal and State laws prohibit discrimination on the basis of gender and race in housing, employment, education, lodging, commercial transactions and a host of other contexts. Human life in the womb is recognized and protected by the laws of many, if not most, of the United States, against crimes of violence.⁴

The targeted victims of sex-selection abortions committed in the United States and worldwide are overwhelmingly female. As early as twenty years ago, Harvard researcher Amartya Sen found that more than 100 million women were demographically missing from the world's population due to discriminatory practices and policies that in part reflected strong cultural preferences for male babies, so-called "son preference."⁵ *The Economist* recently reported on that phenomenon, and particularly on the role that sex-selection abortion plays in son preference.⁶ "It is no exaggeration to call this gendercide," *The Economist* declared. "[T]he cumulative consequence for societies of such individual actions is catastrophic."⁷

In 2007, the U.S. delegation to the United Nations Commission on the Status of Women advocated for a resolution condemning sex-selection abortion.⁸ The U.S. Congress has passed multiple resolutions condemning the People's Republic of China for its failure to end sex-selection abortion.⁹ The American College of Obstetricians and Gynecologists has likewise

³ Sex is determined even before fertilization. If a spermatozoon containing an x chromosome fertilizes an egg, the embryo will become a female; if the spermatozoon contains a y chromosome, the embryo will become a male. "Race" is a description of certain physical characteristics that are genetically determined; as discretely genetic characters, race and ethnicity do not exist, as the Human Genome Project explains:

DNA studies do not indicate that separate classifiable subspecies (races) exist within modern humans. While different genes for physical traits such as skin and hair color can be identified between individuals, no consistent patterns of genes across the human genome exist to distinguish one race from another. There also is no genetic basis for divisions of human ethnicity.

The Human Genome Project, "Minorities, Race and Genomics," available at http://www.ornl.gov/sci/techresources/Human_Genome/elsi/minorities.shtml.

⁴ See, e.g., Unborn Victims of Violence Act of 2004 (PUBLIC LAW 108-212), at 18 U.S.C. 1841 and 22 U.S.C. § 919a (UNIFORM CODE OF MILITARY JUSTICE, Article 119a).

⁵ Amartya Sen, "More Than 100 Million Women Are Missing," *The New York Review of Books*, Vol. 37, Number 20, Dec. 20, 1990, available at <http://www.nybooks.com/articles/3408>.

⁶ "Gendercide: The War on Baby Girls," *The Economist*, Mar. 4, 2010, available at <http://www.economist.com/node/15606229>.

⁷ *Id.*

⁸ *Draft Agreed Conclusions on the Elimination of All forms of Discrimination and Violence Against the Girl Child*, Commission on the Status of Women, 51st Session (26 February - 9 March 2007); see also Janice Shaw Crouse, "United States Resolution Shanghaied by China and India," Concerned Women for America, at <http://www.cwfa.org/articledisplay.asp?id=12532&department=BLI&categoryid=reports&subcategoryid=bluiun>. Crouse noted that United Nations documents condemn the practice of sex-selection abortion; the United Nations Development Fund for Women (UNIFEM) argues that violence against women begins "quite literally" in the womb, and other U.N. documents label sex selection abortions as "violence." *Id.*

⁹ H. R. CON. RES. 83, 109th Cong. (2005); H. R. RES. 794, 109th Cong. (2006).

condemned the practice, stating, “[T]he committee opposes meeting requests for sex selection for personal and family reasons, including family balancing, because of the concern that such requests may ultimately support sexist practices.”¹⁰

The United States is far from immune to this problem. In 2008, researchers Douglas Almond and Lena Edlund of Columbia University analyzed year-2000 census data to document male-biased sex ratios among U.S.-born children of certain Asian and South Asian populations.¹¹ These researchers concluded that the demonstrated deviation from the norm in favor of sons was “evidence of sex selection, most likely at the prenatal stage.”¹² This “Son Preference” was true regardless of the absence in the United States of many factors used to rationalize son bias in other countries (*e.g.*, high dowry payments, patrilocal marriage patterns, and China’s one-child policy) and was irrespective of the mother’s citizenship status; “[i]f anything,” they noted, “mothers with citizenship had more male-biased offspring sex ratios,” although the difference was not considered statistically significant.¹³ Almond and Edlund further observe, “Since 2005, sexing through a blood test as early as 5 weeks after conception has been marketed directly to consumers in the United States, raising the prospect of sex selection becoming more widely practiced in the near future.”¹⁴

In the case of racial selection abortion, it is no exaggeration to say that the African-American population of the United States has been decimated by the widespread availability of abortion on demand in the last forty years, and particularly by the placement of abortion providers in majority-minority population centers. Nationally, for all racial groups, the abortion ratio¹⁵ was 231 abortions for every 1,000 live births.¹⁶ Among women from the 37 health agencies that reported results for race in 2007, “Black women had higher abortion rates and ratios than white women and women of other races.”¹⁷ In the 25 reporting areas that reported cross-classified race and ethnicity data for 2007, “non-Hispanic black women had the highest abortion rates (32.1 abortions per 1,000 women aged 15 – 44 years) and ratios (480 abortions per

¹⁰ American College of Obstetricians and Gynecologists, Committee on Ethics, Committee Opinion 2007, available at <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Ethics/co360.ashx?dmc=1&ts=20111203T1536377176>.

¹¹ D. Almond and L. Edlund, “Son-biased Sex Ratios in the 2000 United States Census,” Jan. 24, 2008, available at www.pnas.org/cgi/doi/10.1073/pnas.0800703105.

¹² *Id.*

¹³ *Id.* In fact, they concluded, “the magnitude of the deviations we find for second and third children is comparable to that documented for India, China and South Korea...” *Id.*

¹⁴ For media reports on sex-selection advertisements, see Susan Sachs, “Clinics’ Pitch to Indian Émigrés: It’s a Boy,” *The New York Times*, Aug. 15, 2001, available at <http://www.geneticsandsociety.org/article.php?id=118>; Rich Lowry, “The Backwardness of Abortion,” *National Review*, Aug. 23, 2001, available at <http://old.nationalreview.com/lowry/lowry082301.shtml>.

¹⁵ “Abortion ratios reflect the relative number of pregnancies in a population that end in abortion compared with live birth; abortion ratios change both according to the proportion of pregnancies in a population that are unintended and the proportion of unintended pregnancies that are continued.” Centers for Disease Control Abortion Incidence Report 2007, available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6001a1.htm?s_cid=ss6001a1_w.

¹⁶ *Id.*; Table 1.

¹⁷ *Id.*; Table 12.

1,000 live births).”¹⁸ Non-Hispanic black women accounted for nearly as many abortions proportionately as non-Hispanic white women (34.4% for black women vs. 37.1% for whites).¹⁹ In 15 out of 38 reporting areas for which the data was available, the percentage of African-American abortions was approximately forty percent or higher, ranging up to 59.1% in one area (Georgia).²⁰

Thus, although African-Americans account for only 13.6% of the U.S. population,²¹ they account for over one-third of all abortions nationally, and in many states, that percentage is much higher. Commenting on this trend, the *Washington Post* observed that in the past 30 years, more mothers of color are opting to abort, and that in 2004, there were 10.5 abortions per 1,000 white women, compared with 50 per 1,000 black women.²² In other words, African-American infants were more than five times more likely to be aborted than white infants.²³ African-American women also obtained the highest percentage of later-term abortions,²⁴ in which risks to health are greater, and are more likely to suffer from preterm birth,²⁵ which has been linked to prior abortion of the maternal patient and is associated with a multiplicity of health problems for the neonatal patient.²⁶

These are grave statistics for the African-American population. Tragically, the CDC observes that “abortion provides a proxy measure for the number of pregnancies that are unwanted.”²⁷

¹⁸ *Id.*; Table 14.

¹⁹ *Id.*

²⁰ *Id.*; Table 12.

²¹ 2000 census data lists persons responding to the category of “Race” with “Black or African-American alone or in combination” at 12.9% of the U.S. population; that percentage rose to 13.6% in the 2010 census. See <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

²² Rob Stein, “Study Finds Major Shift in Abortion Demographics,” *Washington Post*, Sep. 23, 2008, available at <http://pqasb.pqarchiver.com/washingtonpost/access/1559584011.html?FMT=ABS&FMTS=ABS:FT&date=Sep+23%2C+2008&author=Rob+Stein+-+Washington+Post+Staff+Writer+&pub=The+Washington+Post&edition=&startpage=A.3&desc=Study+Finds+Major+Shift+in+Abortion+Demographics> (by subscription).

²³ Notably, although the CDC attributes the comparatively high abortion rates and ratios among African-American women to higher unintended pregnancy rates and a higher percentage of unintended pregnancies ending in abortion, Hispanic women have a slightly higher percentage of pregnancies that are unintended but are no more likely than non-Hispanic white women to end unintended pregnancies by abortion. CDC, *supra*; Table 21.

²⁴ *Id.*; Table 22.

²⁵ African-American women have three times the risk of early preterm birth, defined as delivery at less than 32.0 weeks’ gestation, and four times the risk of extremely preterm birth, defined as delivery at less than 28.0 weeks’ gestation, compared with non-African-American women. G. Alexander et al., *U.S. Birth Weight/Gestational Age Specific Neonatal Mortality: 1995-1997 Rates for Whites, Hispanics and Blacks*, 111 *PEDIATRICS* 61 (2003), available at www.pediatrics.org/cgi/content/full/111/1/e61.

²⁶ B. Rooney & B.C. Calhoun, *Induced Abortion and Risk of Later Preterm Birth*, 8 *J. AM. PHYS. SURG.* 6 (2003).

²⁷ *Id.* “[I]ntended pregnancies are estimated to account for only 4% of all abortions.” *Id.* These data do not appear to be changing over time. Three nationally representative surveys of women obtaining abortions in 1987, 1994-95 and 2001-02 have reported similar demographic results. CDC, *supra*, nn. 7-9.

The CDC notes that multiple factors can influence the incidence of abortion, “including the availability of abortion providers.”²⁸ In this regard, it is important to note that 80% of all non-primary-care abortion providers are located in major metro U.S. regions, where the population of African-American citizens is concentrated.

Pursuant to Congress’ authority to regulate interstate commerce and its power under section 2 of the Thirteenth Amendment and section 5 of the Fourteenth Amendment to “eradicate all badges of slavery”²⁹ and eliminate all barriers to gender equality based on “invidious, archaic and overbroad stereotypes,”³⁰ this bill would prohibit the knowing commitment of abortion based on the sex, gender, color or race of the child or the child’s parent.³¹ The bill also prohibits the use or threat of force to intentionally injure or intimidate any person for the purpose of coercing a sex-selection or race-selection abortion, and the solicitation or acceptance of funds for the purpose of financing such an abortion.³² Civil remedies in the form of injunctive relief may be sought by the Attorney General in a civil action, and perpetrators may face loss of federal funding pursuant to Title VI of the 1964 Civil Rights Act.³³ A private cause of action is also provided for the father of the baby lost to a sex- or race-selection abortion or, in the case of an unemancipated minor, the maternal grandparents of the preborn child.³⁴

Insofar as H.R. 3541 targets only persons who commit, finance or coerce a sex- or race-selection abortion, Congress has broad police powers under the Commerce Clause to enact this legislation in furtherance of the rights of equality secured by the Fourteenth Amendment.³⁵ As the Supreme Court stated in *United States v. Lopez*, “[W]e have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce.”³⁶

Nor does the Supreme Court’s abortion jurisprudence require a different result. Although the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*³⁷ recognized the essential holding of the Court in *Roe v. Wade*³⁸ that women possess the right to obtain an abortion without undue interference from the State before viability, that holding, *Casey* clarified, was based on the Court’s perception that the State’s interests were not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure at that stage.³⁹ However, the Supreme Court has made it clear that States

²⁸ *Id.*; nn. 11, 68-70.

²⁹ *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 439 (1968).

³⁰ *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 131 (1994).

³¹ Sec. 3(a), adding Sec. 249(a)(1) to Ch. 13, tit. 18 U.S.C.

³² Sec. 3(a), adding Sec. 249(a)(2), (3) of Ch. 13, tit. 18 U.S.C.

³³ Sec. 3(a), adding Sec. 249(b)(1), (2) of Ch. 13, tit. 18 U.S.C. The operative provision of Sec. 601 prohibits discrimination on the ground of race, color or national origin, in any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d.

³⁴ Sec. 3(a), adding Sec. 249(b)(3) of Ch. 13, tit. 18 U.S.C.

³⁵ See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

³⁶ 514 U.S. 549, 559 (1995).

³⁷ 505 U.S. 833 (1992).

³⁸ 410 U.S. 113 (1973).

³⁹ *Casey*, 505 U.S. at 846.

have a compelling interest in eliminating discrimination against women and minorities.⁴⁰ Moreover, the *Casey* Court also affirmed the principle that “the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus....”⁴¹

Nor can it be objected that no exception is made in H.R. 3541 for “medical necessity” or “health of the mother.” By definition, abortions conducted because of the sex or race of the infant are elective procedures that do not implicate the health of the maternal patient. Consequently, the absence of a “medical necessity” or “health exception” in this bill is not a constitutional infirmity.⁴²

The balance of H.R. 3541’s operative provisions are likewise well-grounded in constitutional Fourteenth Amendment and Commerce Clause jurisprudence. The term “based on [sex or race]” used by H.R. 3541 is similar to the term “on the grounds of” employed by Title VI, 42 U.S.C. § 2000d, which is incorporated by reference in H.R. 3541. Both of these terms are functionally identical to the well-known and judicially developed term employed by Title VII of the 1964 Civil Rights Act, “because of... [*inter alia*] [race or sex].”⁴³ The Act clarifies that the mother may not be prosecuted or held civilly liable under the Act,⁴⁴ and thus the private right of action provisions⁴⁵ strike only at the commercial activity of providing abortion, which clearly substantially impacts interstate commerce.⁴⁶ The debarment provision is to the same effect. As the Supreme Court has declared, “It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”⁴⁷ The authority of Congress to direct the federal courts to expedite any matter⁴⁸ is conferred by Article III, Sec. 1 of the Constitution.

⁴⁰ See, e.g., *Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (“There is a ‘significant state interest in eradicating the effects of past racial discrimination.’”), quoting *Shaw v. Reno*, 509 U.S. 630, 656 (1993).

⁴¹ 505 U.S. at 846.

⁴² The Supreme Court approved the constitutionality of the federal Partial-Birth Abortion Ban Act despite the absence of a health exception in that statute, based upon the existence of a “documented medical disagreement” whether such an exception was required. *Gonzales v. Carhart*, 550 U.S. 124, 163-64 (2007). In this case, although some authorities contend there is a basis for prenatal sex screening for the purpose of genetic counseling for certain diseases that are gender-determinant, there can be no substantial disagreement that such cases do not implicate the health of the maternal patient.

⁴³ See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (affirming that the Title VII rubric “because of sex” is a workable standard that may be applied in a variety of contexts).

⁴⁴ Sec. 3(a), adding Sec. 249(e).

⁴⁵ Sec. 3(a), adding Sec. 249(b).

⁴⁶ *United States v. Morrison*, 529 U.S. 598, 611 (2000) (“in those cases where we have sustained federal regulation of intrastate activity based upon the activity’s substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor.”).

⁴⁷ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989).

⁴⁸ Sec. 3(a), adding Sec. 249(d).

In conclusion, H.R. 3541 is conceived and drafted pursuant to sound constitutional authority and the best tradition of this nation's commitment to civil rights and equality for all of its citizens. Thank you again for the privilege of appearing before this Honorable Committee.

Respectfully submitted this 6th day of December, 2011.

Steven H. Aden

/s/ Steven H. Aden

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