CASE NO. 13-17247

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

NATIONAL ASSOCIATION FOR THE ADVANCEMENT
OF COLORED PEOPLE, et al.,

Plaintiffs and Appellants,

v.

TOM HORNE, et al.,

Defendants and Respondents.

On Appeal From The
United States District Court for the District of Arizona
Case No. CV-13-01079-PHX-DGC

BRIEF OF *AMICUS CURIAE* ASIAN AMERICANS ADVANCING JUSTICE, *ET AL.* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* Asian Americans Advancing Justice (an affiliation of four independent, non-profit organizations: Asian Americans Advancing Justice | AAJC in Washington, D.C., Asian Americans Advancing Justice | Asian Law Caucus in San Francisco, Asian Americans Advancing Justice | Chicago, and Asian Americans Advancing Justice | Los Angeles); Asian & Pacific Islander American Health Forum; Asian Law Alliance; Association of Asian Pacific Community Health Organization; Asian Pacific American Labor Alliance, AFL-CIO; Asian Pacific American Network of Oregon; Asian Pacific Community in Action; Asian Women for Health; National Asian Pacific American Families Against Substance Abuse; National Council of Asian Pacific Islander Physicians; National Tongan American Society; and South Asian Americans Leading Together; state that each of the *amici* is a non-profit organization, has no parent companies, and has not issued shares of stock.

STATEMENT OF COMPLIANCE WITH RULE 29(C)(5)

Amici curiae state that (a) no party's counsel authored this brief in whole or in part; (b) no party, nor counsel for either party, contributed money that was intended to fund preparing or submitting this brief; and (c) no person other than *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. Discriminatory Laws Based on the Stereotypes Underlying H.B. 2443 Repeatedly Have Been Passed, and Later Repudiated, Including Laws That Were Race-Neutral on Their Face 7

A. The Same "Perpetual Foreigner" and "Cultural Threat" Stereotypes Underlying H.B. 2443 Have Resulted In a History of Discriminatory Laws 7

B. History Has Exposed the Manifest Injustice and Concrete Injury Inherent in These Unconstitutional Laws 12

II. House Bill 2443 Is an Unconstitutional Law that Injures AAPI Women by Endorsing the Same Stereotypes Invoked to Justify Discrimination Against Them Throughout History 15

A. The Statements of the Arizona Legislature Leave No Doubt That H.B. 2443 Was Motivated by the Same Stereotypes Underlying Historic Discrimination Against AAPIs 15

B. There Is No Legitimate Explanation for the Act's Passage Other Than Unsupported Stereotypes of AAPI Women 18

III. Placed in the Proper Historical Context, the Injury Experienced by AAPI Women in Arizona as a Result of H.B. 2443 Is Apparent and Mandates Reversal of the District Court's Decision 21

A. House Bill 2443 Concretely Injures AAPI Women by Endorsing the "Perpetual Foreigner" and "Cultural Threat" Stereotypes 21

B. House Bill 2443 Concretely Injures AAPI Women by Subjecting Them to Suspicion Based Solely on Their Race 24

C. The Claimed "Benevolent" Purpose of H.B. 2443 Only Makes the Injury Suffered by AAPI Women in Arizona More Profound 25

IV. If the District Court's Decision Is Upheld, AAPI Women Will Be Deprived of Any Effective Means to Enforce the Equal Protection Guarantees Designed to Prevent Statutes Like H.B. 2443 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. Wright,
468 U.S. 737 (1984)....................22, 23, 24

Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco,
624 F.3d 1043 (9th Cir. 2010)....................23

Coalition for Economic Equity v. Wilson,
122 F.3d 692 (9th Cir. 1997)....................24, 27

Fong Yue Ting v. United States,
149 U.S. 698 (1893)....................9

Hirabayashi v. United States,
828 F.2d 591 (9th Cir. 1987)....................11, 12, 14

Ho by Ho v. San Francisco Unified School Dist.,
147 F.3d 854 (9th Cir. 1998)....................8, 10, 13, 15

J.E.B. v. Alabama ex. rel. T.B.,
511 U.S. 127 (1994)....................12, 13, 25, 26, 27

Korematsu v. United States,
323 U.S. 214 (1944)....................11, 21

Loving v. Virginia,
388 U.S. 1 (1967)....................12

Oyama v. California,
332 U.S. 633 (1948)....................11

Philips v. Perry,
106 F.3d 1420 (9th Cir. 1997)....................14

Takahashi v. Fish & Game Commission,
334 U.S. 410 (1948)..20

Tucson Woman's Clinic v. Eden,
379 F.3d 531 (9th Cir. 2004) 25

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982) 23

Washington v. Seattle School Dist. No. 1,
458 U.S. 457 (1982)...12, 23

Yick Wo v. Hopkins,
118 U.S. 356 (1886)..10

<u>Statutes</u>

Arizona House Bill 2443 ....passim

Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (repealed 1943) 9

Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952) 9

Page Act of 1875, Sect. 141, 18 Stat. 477 9

Tydings-McDuffie Act of 1934, ch. 84, 48 Stat. 456 (1934) (amended 1946) 9

<u>Treatises and Other Authorities</u>

Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. Rev. 37 (1998) 10

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Moni Basu, *In rare apology, House regrets exclusionary laws targeting Chinese*, CNN (June 19, 2012)....................13

Hearing on H.B. 2443 Before the H. Comm. On Health and Human Services 2011 Leg., 50th Sess., 1st Reg. Sess. (Az. February 9, 2011)....................15, 18, 20

Hearing on H.B. 2443 Before the H. Comm. of the Whole 2011 Leg., 50th Sess., 1st Reg. Sess. (Az. Feb. 21, 2011)....................16, 20

Hearing on H.B. 2443 Before the S. Comm. on Healthcare and Medical Liability Reform 2011 Leg., 50th Sess., 1st Reg. Sess. (Az. March 2, 2011)....................3, 6, 16, 17, 18, 19

Ernesto Hernandez-Lopez, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship*, 14 Tex. Wesleyan L. Rev. 255, 269 (2008) 8

Prenatal Nondiscrimination Act (PRENDA) of 2013, H.R. 447, 113th Cong. (2013)....................29

Prenatal Nondiscrimination Act (PRENDA) of 2013, S. 138, 113th Cong. (2013)....................29

Press Release, Office of Allen Fletcher, Texas House of Representatives, Jun. 11, 2013, available at http://www.house.state.tx.us/news/member/press-releases/?id=4616&session=83&district=130&bill_code=2830 28

Molly Redden, *GOP Lawmaking: We Need to Ban Sex-Selective Abortions Because of Asian Immigrants*, Mother Jones (Feb. 25, 2014)....................28

S. Comm. on Healthcare and Medical Liability Reform, 2011 Leg., 50th Sess., 1st Reg. Sess., (Az. March 2, 2011)....................3

S. Res. 201, 112th Congress (2011-2012) 13

Frank H. Wu, Yellow: Race in America Beyond Black and White 79-88 (2002)....................7

STATEMENT OF INTEREST

Asian Americans Advancing Justice ("Advancing Justice") is a national affiliation of four independent, non-profit, non-partisan organizations whose mission is to promote a fair and equitable society for all by working for civil and human rights and empowering Asian Americans and Pacific Islanders and other underserved communities. The members of the affiliation are: Asian Americans Advancing Justice | AAJC in Washington, D.C., Asian Americans Advancing Justice | Asian Law Caucus in San Francisco, Asian Americans Advancing Justice | Chicago, and Asian Americans Advancing Justice | Los Angeles. Through strategies that include litigation, direct legal services, public policy advocacy, community education, and community mobilization, Advancing Justice is committed to challenging discrimination and has advocated for equal protection for all, including in the areas of health care and immigration. Advancing Justice is joined on this brief by other race- and gender-based civil rights organizations, each of which is similarly committed to advancing civil and human rights. A description of these additional *amici* is attached as Appendix A.[1]

[1] Both parties have consented to *Amici* filing this brief. *See* Fed. R. App. Pro. 29(a).

Amici file this brief in support of Plaintiffs-Appellants the National Association for the Advancement of Colored People, Maricopa County Branch, and the National Asian Pacific American Women's Forum.

SUMMARY OF ARGUMENT

Arizona House Bill 2443 ("H.B. 2443" or the "Act") is a legislative endorsement of the same harmful stereotypes that have been used to justify discrimination against members of the Asian American and Pacific Islander ("AAPI") community throughout history. In passing this bill, the Arizona Legislature has concretely injured AAPI women within the state, including members of Plaintiff-Appellant the National Asian Pacific American Women's Forum, by codifying these invidious stereotypes and subjecting AAPI women to an additional level of scrutiny in the exercise of their reproductive rights. Given that AAPI women in Arizona, including Appellants, were the clear targets of H.B. 2443's sex-selective abortion ban, it strains credulity that they are not a proper party with standing to challenge the Act in court.

Although the text of the Act purports to be race-neutral, the legislative record leaves no doubt that H.B. 2443 arose primarily, if not exclusively, from negative race-based assumptions about the conduct of Black and AAPI women within the state. As expressed by the Arizona Legislature, the rationale behind the Act's sex-selection provisions is the assumption that AAPI women, despite their

longstanding presence in Arizona and integration into its communities, are likely to "bring[] *their* traditions" into the state – including, allegedly, sex-selective abortions of the kind practiced in India, China, and South Korea – in a way that "really def[ies] the values of America." Associated Press, *Arizona law bans abortion based on race or gender* (March 31, 2011) (quoting Arizona State Senator Nancy Barto) (emphasis added); *see also* Hearing on H.B. 2443 Before the S. Comm. on Healthcare and Medical Liability Reform, 2011 Leg., 50th Sess., 1st Reg. Sess., 92-93 (Az. March 2, 2011) (the "March 2, 2011 Leg. Hearing") (statement of Sen. Nancy Barto, Chairman, S. Comm. on Healthcare & Med. Liab. Reform) (expressing a "need to guard against" this influence "[w]ith a multicultural society as America is becoming more of."). The Legislature admitted that they did not have hard data to support its assumptions. Instead, the Legislature reasoned that the presence of AAPI women in the state, standing alone, was sufficient to justify the Act. *See, e.g.*, Mar. 2, 2011 Leg. Hearing at 92 (statement of State Sen. Rick Murphy, Member, S. Comm. on Healthcare & Med. Liab. Reform).

The race-based assumptions that the Arizona Legislature drew about the conduct of AAPI women are based on a set of pernicious stereotypes that the AAPI community has struggled to dispel for over a century. Since the now-infamous "Yellow Peril" era, AAPIs have battled the perception that they are perpetual

outsiders incapable of assimilation into American society, who adhere to a culture that undermines American values. These intertwined stereotypes of the "perpetual foreigner" and "cultural threat" have wrought harm on the AAPI community throughout its history in the United States. Under the baggage of these stereotypes, all members of the AAPI community are conceived of as belonging to a monolithic group of cultural outsiders, whose ethnic background is deemed to trump all other values or loyalty and place them outside the mainstream of American society. These pernicious racial stereotypes animated the first well-documented wave of prejudicial laws against Asian Americans during the "Yellow Peril" era and were the same impulses that allowed the tragedy of Japanese American internment to occur during World War II. Placed in historical context, it is apparent that H.B. 2443 follows in the footsteps of these earlier laws—each of which since have been repudiated as repugnant to the Constitution.

The district court's holding that Appellants do not suffer a constitutionally recognizable injury as a result of the Act betrays a fundamental misunderstanding of harm under the Equal Protection Clause. In passing H.B. 2443, the Arizona Legislature codified unconstitutional racial stereotypes and subjected AAPI women in the state to suspicion that similarly-situated white women seeking abortion-related medical care would not face. This legislative endorsement of prejudice and race-based suspicion is a concrete injury. Appellants should not be

required to validate the Legislature's race-based conclusion about AAPI women's presumed propensity to engage in sex-selection in order to challenge the Legislature's use of race-based stereotypes to pass a law that perpetuates discrimination. Given that legislatures around the country are presently considering bills similar to H.B. 2443, acceptance of this flawed and dangerous reasoning would have wide-spread consequences for the AAPI community. *Amici* respectfully request that this Court overturn the district court's holding that Appellants lack standing to challenge H.B. 2443.

ARGUMENT

The stereotypes of AAPI women that the Arizona Legislature relied on in passing H.B. 2443 are not new. To the contrary, the Legislature's statements in support of the Act endorse the same stereotypes invoked throughout history to rationalize discrimination against this community. For over a century, AAPIs have battled the perception that they are members of a racial group that is incapable of assimilating into American society and whose presumed adherence to a "foreign" culture threatens American values. Characterized in an earlier era as the "Yellow Peril," these anxieties persist in modern-day hostility and prejudices against the AAPI community. In passing H.B. 2443, the Arizona Legislature injured AAPI women in the state by accepting and codifying this view and subjecting AAPI women to race-based suspicion regarding their reasons for seeking abortion-related

medical services. *See infra* Section II(A) (discussing the legislative history surrounding the Act); March 2, 2011 Leg. Hearing at 92-93 (statement of State Sen. Rick Murphy, Member, S. Comm. on Healthcare & Med. Liab. Reform) ("We know that . . . people from those countries and from those cultures are moving and immigrating in some reasonable numbers to the United States and to Arizona . . . [W]hy in good conscience would we want to wait until the problem does develop and bad things are happening . . . when we can be proactive . . . ."); March 2, 2011 Leg. Hearing at 88 (statement of State Sen. John Nelson, Member, S. Comm. on Healthcare & Med. Liab. Reform) ("Having been in China, having seen what went on over there … this is a step in the right direction."). The district court's denial of standing to these women, including members of Plaintiff-Appellant National Asian Pacific American Women's Forum, ignores this concrete injury. The district court's decision should be overturned.

I. Discriminatory Laws Based on the Stereotypes Underlying H.B. 2443 Repeatedly Have Been Passed, and Later Repudiated, Including Laws That Were Race-Neutral on Their Face

A. The Same "Perpetual Foreigner" and "Cultural Threat" Stereotypes Underlying H.B. 2443 Have Resulted In a History of Discriminatory Laws

An understanding of the way that the stereotypes underlying H.B. 2443 have been mobilized in the past is necessary to appreciate fully the depth of the injury that AAPI women in Arizona suffer as a result of H.B. 2443. This brief uses "perpetual foreigner" and "cultural threat" as conceptual descriptions of the justifications proffered throughout history to support the notion that a special set of laws is needed to restrict conduct in which AAPIs are presumed to engage. The "perpetual foreigner" perception positions AAPIs as outsiders to mainstream society, assumed to not be "real Americans" and denied the presumption of belonging. *See, e.g.*, Frank H. Wu, *The Perpetual Foreigner: Yellow Peril in the Pacific Century*, in Yellow: Race in America Beyond Black and White 79-88 (2002) (describing the stereotype).[2] An invidious outgrowth of the "perpetual

[2] Wu provides several real-life examples of the stereotype in practice and how it affects how AAPIs perceive their place in American society: "Being asked 'Where are you really from?' likely will not result in my being denied an apartment or a job, except in isolated instances. I wonder what people are thinking, though; when

foreigner" stereotype is the "transform[ation] [of AAPIs as] a racial threat." *Id.* at 95. This belief system invokes nativist anxieties about the spread of values or practices that harm American society, and assumes that AAPIs are predetermined to think and behave in a certain way as a result of their race. *See id.*, *see also* Ernesto Hernandez-Lopez, *Global Migrations and Imagined Citizenship: Examples from Slavery, Chinese Exclusion, and When Questioning Birthright Citizenship*, 14 Tex. Wesleyan L. Rev. 255, 269 (2008) (explaining that historical laws restricting the rights of Chinese immigrants "relied on cultural arguments that they were a different race and had a history, biology and culture unique and so distinct that they could not assimilate. It was claimed that these differences threatened U.S. republican governance.").

These intertwined stereotypes of the "perpetual foreigner" and "cultural threat" have given rise to what this Court has referred to as a "long history of governmental discrimination based on race" against the AAPI community. *Ho by Ho v. San Francisco Unified School Dist.*, 147 F.3d 854, 863 (9th Cir. 1998).

I was interviewing for a position as a law professor only seven years ago, I was told by a senior faculty member at one school (in California, no less), 'How appropriate that we have the Asian candidate today'—he was referring to December 7, Pearl Harbor Day. I believe the questions and statements are signals, along a spectrum of invidious color consciousness that starts with speculation but leads to worse. To be met with it so quickly and often reminds me, over and over, that I am being treated differently than I would be if I were white." *Id*. at 83.

During the now-infamous "Yellow Peril" era, members of the AAPI community were legislatively excluded from entering the United States and gaining citizenship. *See, e.g.*, Page Act of 1875, Sect. 141, 18 Stat. 477 (federal law restricting immigration for "lewd and immoral" purposes, targeting Asian women presumed to be prostitutes); Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, 58-61 (repealed 1943) (prohibiting immigration of all Chinese laborers); Immigration Act of 1917, ch. 29, 39 Stat. 874 (repealed 1952) (establishing an "Asiatic barred zone"); Tydings-McDuffie Act of 1934, ch. 84, 48 Stat. 456 (1934) (amended 1946) (imposing annual quota of fifty Filipino immigrants). Each of these discriminatory laws were justified by reference to the prejudices underlying the "perpetual foreigner" and "cultural threat" stereotypes. The Chinese Exclusion Act, for instance, was based on Congress's determination that:

> [T]he presence within our territory of a large number Chinese laborers, of *a distinct race and religion*, . . . *tenaciously adhering to the customs* and *usages of their own country* . . . and apparently *incapable of assimilating* with our people, might *endanger good order, and be injurious to the public interests* . . . .

Fong Yue Ting v. United States, 149 U.S. 698, 717 (1893) (emphasis added).

In addition to these explicitly discriminatory measures, various state, county, and municipal laws were passed that, although race-neutral on their face, clearly were designed to discriminate against members of the AAPI community. The well-known case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), for instance, concerned a San Francisco ordinance that banned operating hand laundries in wooden buildings. Although the ordinance purported to apply equally to all citizens, the Supreme Court deemed it unconstitutional based on the evidence that it, in fact, targeted Chinese immigrants. *Id.* at 373-74. As this Court later recognized, the ordinance at issue in *Yick Wo* was "only 'the small tip of a very large iceberg' of Sinophobic legal measures" passed during this era. *Ho by Ho,* 147 F.3d at 863.

California's facially race-neutral Alien Land Laws, which prohibited "aliens ineligible for citizenship" from owning agricultural land or possessing long-term leases, similarly were deemed a reaction to the influx of Japanese immigrants and the fear engendered by the perception of this group as outsiders who threatened American culture. Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 B.C. L. Rev. 37 (1998). The laws were declared unconstitutional in spite of the fact that California "disclaimed any implication that the Alien Land Law is racist in its origin, purpose or effect" and that "nowhere in the statute [was] there a single mention of race, color, creed

or place of birth." *Oyama v. California*, 332 U.S. 633, 650 (1948) (Murphy, J., concurring). Justice Murphy's concurrence in *Oyama* captured the anti-Japanese sentiment animating the Alien Land Laws, noting the history of "[c]harges of espionage, unassimilativeness, clannishness and corruption of young children" against this group. *Oyama*, 332 U.S. at 653 (Murphy, J., concurring).

During World War II, the sentiments underlying the "perpetual foreigner" and "cultural threat" stereotypes led to perhaps the most egregious and best documented example of discriminatory treatment involving the AAPI community: the internment, without due process, of over 120,000 Japanese Americans. The historical prejudices against AAPIs cannot be separated from the history of internment. As Justice Murphy noted in his famed dissent in *Korematsu*, justification for the internment order was sought, not on the basis of actual data, but "upon [the] questionable racial and sociological grounds . . . [that] [i]ndividuals of Japanese ancestry . . . are 'a large unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.'" *Korematsu v. United States*, 323 U.S. 214, 236-38 (1944) (Murphy, J., dissenting); *Hirabayashi v. United States*, 828 F.2d 591, 598 (9th Cir. 1987) (the military justified its internment of Japanese Americans during WWII by appealing to "traits peculiar to citizens of Japanese ancestry" that would make it "impossible to separate the loyal from the disloyal"). Critically, although Germany and Italy, too,

were enemies during World War II, the United States did not accord similar treatment to German Americans or Italian Americans – presumably because these communities were not stereotyped as incapable of assimilation. The differing treatment afforded German and Italian Americans, on the one hand, and Japanese Americans, on the other, shows that the internment policy was based on pernicious stereotypes of AAPIs, and the wrongful notion that race could be used as a predictor of conduct.

B. History Has Exposed the Manifest Injustice and Concrete Injury Inherent in These Unconstitutional Laws

The overriding lesson that can be drawn from these historical examples is that the Constitution does not tolerate laws passed on the basis of invidious stereotypes that attempt to predict conduct on the basis of race. *See Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 484 (1982) ("[T]he central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race.") (internal quotation marks and citation omitted). Indeed, the heart of the jurisprudence surrounding the Equal Protection Clause is the Supreme Court's "consistent[] repudiat[ion] [of] 'distinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded on the doctrine of equality.'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *see also J.E.B. v.*

Alabama ex. rel. T.B., 511 U.S. 127, 128 (1994) (decrying "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice."). This prohibition extends not only to explicit racial classifications, but also to laws where "despite [the legislation's] facial neutrality[,] there is little doubt that the [law] was effectively drawn for racial purposes." *Washington*, 458 U.S. at 471. By the same token, just as the Constitution does not tolerate laws passed on the basis of invidious stereotypes, it recognizes the serious constitutional harms that such laws inflict.

The injustice occasioned by a history of race-based decisionmaking in laws targeting the AAPI community has become increasingly clear with the passage of time. In 2012, both houses of Congress passed resolutions formally expressing regret for the Chinese exclusion laws. S. Res. 201, 112th Congress (2011-2012); *see also* Moni Basu, *In rare apology, House regrets exclusionary laws targeting Chinese*, CNN (June 19, 2012). This Court likewise has referred to the justifications underlying the facially race-neutral statute in *Yick Wo* as "racism's ultimate expression" and "one of the more appalling statements of racial bigotry in Western legal history." *Ho by Ho*, 147 F.3d at 863 (internal quotation marks and citation omitted). In the same vein, "deference to the military's race-based judgment about the threat posed by Japanese Americans" during World War II has been deemed "one of the [Supreme] Court's most embarrassing moments, . . .

thoroughly repudiated by history." *Philips v. Perry*, 106 F.3d 1420, 1439 (9th Cir. 1997) (Fletcher, J., dissenting). The United States government was so ashamed of its justifications for internment that the military took great pains to suppress them, "burning . . . drafts and memorandums of the original report" in support of the practice. *Hirabayashi*, 828 F.2d at 598. The legacy of *Korematsu* is that laws premised on race-based assumptions are repugnant to the Constitution and ought to be repudiated.

Although *amici* wish that the threat of legislation based on such odious race-based distinctions could be relegated to the past, the legislative history surrounding H.B. 2443 shows that the "perpetual foreigner" and "cultural threat" stereotypes continue to result in discriminatory laws that stigmatize the AAPI community. AAPIs are concretely injured when these pernicious stereotypes are codified and perpetuated by their state's government. The district court's decision, which refused to recognize this injury, must therefore be overturned.

II. House Bill 2443 Is an Unconstitutional Law that Injures AAPI Women by Endorsing the Same Stereotypes Invoked to Justify Discrimination Against Them Throughout History

A. The Statements of the Arizona Legislature Leave No Doubt That H.B. 2443 Was Motivated by the Same Stereotypes Underlying Historic Discrimination Against AAPIs

In the words of this Court, "[m]isuse of race by government for over three centuries in America must make any new governmental use of race stand suspect and in pressing need of justification." *Ho by Ho*, 147 F.3d at 863. H.B. 2443 has no such pressing justification. Rather, the Act's rationale rests solely on the unsupported perception that a special law is required to regulate the conduct of AAPI women who are assumed, despite the AAPI community's longstanding presence in Arizona, to cleave to the sex-selective abortion practices allegedly common in their "country of origin or the country to which they trace their ancestry." Hearing on H.B. 2443 Before the H. Comm. On Health and Human Services 2011 Leg., 50th Sess., 1st Reg. Sess., 88 (Az. February 9, 2011) ("Feb. 9, 2011 Leg. Hearing") (statement of Sydney Hay).

Indeed, the statements by the Arizona Legislature in support of H.B. 2443 are better suited to the "Yellow Peril" era than today. In their debates on the bill, legislative supporters justified the restriction against sex-selective abortions with

unabashed appeals to the "perpetual foreigner" and "cultural threat" stereotypes of the AAPI community. The lawmakers' intention to target H.B. 2443 at Arizonians presumed to be affiliated with so-called "sex-selective" cultures appears throughout the legislative record. For instance, one of the Act's sponsors, State Representative Steve Montenegro stated plainly, "[t]here's countries like China, countries in Asia that have a strong problem in sex selection." Hearing on H.B. 2443 Before the H. Comm. of the Whole 2011 Leg., 50th Sess., 1st Reg. Sess., 44 (Az. Feb. 21, 2011) (the "Feb. 21 2011 Leg. Hearing") (statement of Rep. Steve Montenegro). Many others echoed his statements. *See, e.g.* March 2, 2011 Leg. Hearing at 88 (statement of State Sen. John Nelson, Member, S. Comm. on Healthcare & Med. Liab. Reform) ("Having been in China, having seen what went on over there . . . this is a step in the right direction."); Feb. 9, 2011 Leg. Hearing at 111 (statement of Rep. Cecil Ash, Chairman, Comm. on Health & Human Services) ("I had occasion to work at the United Nations in 2006 when the United States was advancing this issue. I saw a great deal of evidence that it was occurring in China and India at the time.").

Some legislators were even more direct in explaining their intention to pass a bill regulating the conduct of AAPI women. According to Senator Rick Murphy: "We know that people from those countries and from those cultures are moving and immigrating in some reasonable numbers to the United States and to Arizona,"

and that the "problem" of sex-selection was likely to "develop" and "bad things . . . happen[]" as a result. Mar. 2, 2011 Leg. Hearing at 92-93 (statement of State Sen. Rick Murphy, Member, S. Comm. on Healthcare & Med. Liab. Reform). Senator Nancy Barto likewise shared her concerns about an increasingly diverse population: "The trend lines [of sex- and race-selection] are there. With a multicultural society as America is becoming more of, we have to guard against that." Mar. 2, 2011 Leg. Hearing at 95 (Statement of State Sen. Nancy Barto, Chairman, S. Comm. on Healthcare & Med. Liab. Reform). After the bill passed, Senator Barto expressed her fear that if H.B. 2443 had not been enacted, AAPI women would "bring[] *their* traditions" – which were presumed to include sex-selective abortions – into Arizona in a way that "really def[ies] the values of America." Associated Press, *Arizona law bans abortion based on race or gender* (March 31, 2011) (quoting Arizona State Senator Nancy Barto) (emphasis added). Among the most xenophobic statements were those that blatantly accused AAPI women of immigrating to this country for the purpose of having sex-selective abortions. Legislative testimony on behalf of H.B. 2443 included that of Sydney Hay, a representative of the anti-choice group Defending America's Future: "[The United States has not enacted a ban on sex-selective abortion], making the United States a safe haven for those who would seek what is illegal in their own country to

come here for this procedure." Feb. 9, 2011 Leg. Hearing at 89 (statement of Sydney Hay).

Like previous laws resting on the "perpetual foreigner" and "cultural threat" stereotypes, the Arizona legislators' statements in support of H.B. 2443 cast suspicion on all AAPI women by presuming the existence of particular cultural practices that threaten to undermine American society. They regarded AAPI women as a monolithic group whose shared "ancestry" was sufficient to predict their behavior. Furthermore, the ill motives legislators assigned to immigrant AAPI women demean these women and discredit the challenging, nuanced, and private decisions they have made.

B. There Is No Legitimate Explanation for the Act's Passage Other Than Unsupported Stereotypes of AAPI Women

The outsize influence of the "perpetual foreigner" and "cultural threat" stereotypes in justifying H.B. 2443 further is illuminated by the lack of hard data supporting the Legislature's fear that sex-selection was occurring in the state. In his statement supporting the Act, Senator Murphy explicitly acknowledged that the Legislature "[*did not*] *have enough data* . . . to really be sure whether or not the problem that this bill would address is happening now in Arizona and in the United States." Mar. 2, 2011 Leg. Hearing at 92 (statement of State Sen. Rick Murphy,

Member, S. Comm. on Healthcare & Med. Liab. Reform) (emphasis added).

Senator Murphy dismissed this lack of data as irrelevant:

> *[B]e that as it may [that the Legislature lacks data],* why does that mean that we should wait and see whether it happens before we address it. . . . We know that it's something that's pervasive in some areas. *We know that people from those countries are moving and immigrating* in some reasonable numbers *to the United States and to Arizona*. And so . . . *why* in good conscience would we want to *wait until the problem does develop* and bad things are happening . . . when we can be proactive and try to prevent the problem . . . .

Id. at 92-93 (emphasis added). Senator Murphy assumed that a "problem [would] develop" simply due to the presence of AAPI women within the state, regardless of whether he could identify any evidence to support his position. An anti-choice advocate made similar admissions in his testimony in support of the bill. *See* Mar. 2, 2011 Leg. Hearing at 73 (statement of Sydney Hay) (dismissing as irrelevant the fact that "statistics don't exist" and that "the data is not available"). Even H.B. 2443's sponsor, Representative Steve Montenegro, could not marshal verifiable

data in support of the Act. *See* Feb. 9, 2011 Leg. Hearing at 65, 74 (statement of Rep. Steve Montenegro) (noting the lack of "in-depth data in the state").

In fact, the 2009 Arizona Department of Health Services data reveals no statistically significant discrepancies between the percentage of male and female births in Arizona among all women, including AAPI women. Complaint, ¶ 50. H.B. 2443 opponent Representative Matt Heinz, a practicing physician, offered the assessment that "[g]reater than 90 percent of termination … in the state of Arizona actually occur prior to 12 weeks, which means that the gender is impossible to determine." Feb. 21, 2011 Leg. Hearing at 8. Appellants have alleged, moreover, that among AAPI women, 91 percent obtaining abortion care in Arizona do so before this time. Compl., ¶ 51.

The legislative record thus makes clear that H.B. 2443 was passed to respond, not to any documented problem, but to a perceived threat posed by the presence of AAPI women within the state. Despite its purported facial race-neutrality, H.B. 2443 is a clear pretext for singling out AAPI women for differential treatment. *See Takahashi v. Fish & Game Commission*, 334 U.S. 410, 427 (1948) ("We need but unbutton the seemingly innocent words of [the law] to discover beneath them the very negation of all the ideals of the equal protection clause.") (Murphy, J. concurring). Its continued presence on the books directly injures AAPI women in Arizona.

III. Placed in the Proper Historical Context, the Injury Experienced by AAPI Women in Arizona as a Result of H.B. 2443 Is Apparent and Mandates Reversal of the District Court's Decision

Despite the clear evidence that H.B. 2443 targets AAPI women, the district court dismissed Appellants' claims for lack of standing, holding that Appellants had failed to allege an "injury" as a result of the statute sufficient to confer standing under Article III of the United States Constitution. This decision is not supported by law, fails to account for the historical record of discrimination against the AAPI population, and ignores the Act's injury to AAPI women in Arizona by codifying prejudices against them and subjecting them to unequal suspicion on account of their race.

A. House Bill 2443 Concretely Injures AAPI Women by Endorsing the "Perpetual Foreigner" and "Cultural Threat" Stereotypes

Given the documented history of harm arising from the "perpetual foreigner" and "cultural threat" view of AAPI women, the Arizona Legislature's willingness to pass a law that endorses these stereotypes injures members of the AAPI community. *Cf. Korematsu*, 323 U.S. at 239 (condemning the military's willingness to issue orders based, not on actual data, but on an "accumulation of much of the misinformation, half-truths and insinuations that for years have been

directed against Japanese Americans by people with racial and economic prejudices.”).

Allen v. Wright, the principal case relied on by the district court in dismissing Appellants' claims, does not hold otherwise. To the contrary, the *Allen* Court emphasized that “the stigmatizing injury often caused by racial discrimination . . . is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing.” *Allen v. Wright*, 468 U.S. 737, 755 (1984). *Allen* limited this principle only by requiring that standing be contained to “those persons who are personally denied equal treatment by the challenged discriminatory conduct.” *Id.* (internal quotation marks and citation omitted). The Court in *Allen* thus denied standing to a nationwide class of parents of Black children attending public schools who sued the Internal Revenue Service (“IRS”) for allegedly failing to enforce adequately its rule that tax-exempt status would not be granted to schools discriminating on the basis of race. The parents did not allege that their children had “been the victims of discriminatory exclusion from the schools whose tax exemptions they challenge” or that they “would ever apply to” any such school. *Id.* at 742-44, 746. The *Allen* Court explained that the standing limitation imposed on the plaintiffs in that case was necessary to ensure that, for instance, a “black person in Hawaii,”

could not file suit alleging inadequate enforcement of anti-discrimination guidelines "in Maine." *Id.* at 755-56.

In other words, the *Allen* Court denied standing to a nationwide class of plaintiffs based on the IRS's alleged failure to enforce adequately guidelines designed to *protect against* racial discrimination. *See id.* This decision is distinguishable from the injury suffered by AAPI women in Arizona by a statute that effectively *codifies* racial prejudice and invidious stereotypes. The injury suffered by AAPI women in Arizona is not contained to "the psychological consequence presumably produced by observation of conduct with which one disagrees." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc*., 454 U.S. 464, 485 (1982). Rather, the Arizona Legislature has inflicted direct harm on Appellants by affirmatively endorsing and perpetuating the invidious stereotypes that have been invoked against them throughout history. *See Washington*, 458 U.S. at 470 (whenever the government "uses the racial nature of an issue to define the governmental decisionmaking structure, [it] imposes substantial and unique burdens on racial minorities."); *cf. also Catholic League for Religious & Civil Rights v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1052 (9th Cir. 2010) (distinguishing *Valley Forge*'s statement regarding the insufficient injury produced by "observation of conduct with which one disagrees" from affirmative "government condemnation" of one's

own beliefs). AAPI women in Arizona are precisely the citizens "who are personally denied equal treatment" by the challenged law. *Allen*, 468 U.S. at 755 (internal quotation marks and citation omitted). They are the proper parties to challenge the law, and *Allen* does not foreclose their claims.

B. House Bill 2443 Concretely Injures AAPI Women by Subjecting Them to Suspicion Based Solely on Their Race

In addition to codifying racial stereotypes, H.B. 2443 injures AAPI women in Arizona by subjecting them to race-based suspicion that similarly-situated white women do not face. The statements of the Arizona Legislature leave no doubt that the sex-selective abortion provision of H.B. 2443 was enacted to regulate the conduct of AAPI women. *See supra* Section II. AAPI women seeking constitutionally-protected medical services are therefore rendered suspicious solely on account of their race. As this Court has held, "whenever the government treats any person unequally because of his or her race, that person has *suffered an injury* that falls squarely within the language and spirit of the Constitution's guarantee of equal protection." *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 701 (9th Cir. 1997) (emphasis added) (internal quotation marks and citation omitted). Here, despite the fact that the Legislature considered no data to suggest that AAPI women are, in fact, more likely to engage in sex-selection, they are unequally singled out for suspicion as a result of the Act. The unconstitutional distinction

that H.B. 2443 draws on the basis of race is a concrete injury under the Equal Protection Clause. *See id.*

C. The Claimed "Benevolent" Purpose of H.B. 2443 Only Makes the Injury Suffered by AAPI Women in Arizona More Profound

Appellants' injury is not lessened by the fact that H.B. 2443 purports to "protect" female AAPI fetuses. To the contrary, the notion that a special law is required to "protect" AAPI fetuses from their mothers' presumed propensity to seek sex-selective abortions only reinforces the harmful and damaging stereotypes that underlie Appellants' injury.

As this Court has recognized in the analogous context of gender discrimination, where a "particular history" of discrimination against a protected class exists, courts have rejected as "illegitimate" proposed justifications for the challenged law that "stem[] from" the very stereotypes that gave rise to the history of discrimination in the first place. *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 543 (9th Cir. 2004) (in light of the "particular history of sex discrimination[,] . . . interests stemming from romantic paternalism towards women or sex stereotyping" are not legitimate justifications for laws that discriminate on the basis of gender). This statement from *Tucson Woman's Clinic* echoes the Supreme Court's warning in *J.E.B.* that "government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad'

generalizations." *J.E.B.*, 511 U.S. at 135. The Supreme Court held that it "should be axiomatic" that the Equal Protection Clause is violated in such circumstances, where legislation "serves to ratify and perpetuate" these stereotypes. *Id.* at 130-31; *see also id.* at 133-34 (likening the supposedly benign rationale espoused by defendants in support of gender-based peremptory challenges to the "attitude of romantic paternalism" historically used to exclude women from mandatory jury service) (internal quotation marks and citation omitted). Because it rests on the very race-based assumptions that render the law unconstitutional in the first place, H.B. 2443's claimed "benevolent" purpose only intensifies the harm suffered by AAPI women.

IV. If the District Court's Decision Is Upheld, AAPI Women Will Be Deprived of Any Effective Means to Enforce the Equal Protection Guarantees Designed to Prevent Statutes Like H.B. 2443

That AAPI women in Arizona have standing to challenge H.B. 2443 is further illustrated by the absurdity of the argument that they do not. The district court rested its denial of standing on the fact that Appellants did not allege a desire to "engage in any conduct prohibited by the Act." Order Granting Motion to Dismiss, U.S. Dist. Ariz. Case No. 13-CV-01079-DGC, Doc. 44, 6 (Oct. 3, 2013) (internal quotation marks and citation omitted). At its core, this argument rests on the unsupportable proposition that, unless AAPI women in Arizona validate the

invidious stereotypes that motivated the passage of H.B. 2443 by seeking sex-selective abortions, they have no standing to challenge this racist and unconstitutional law. The notion that the only people injured by this law are those who seek to engage in sex-selective abortions betrays a fundamental misunderstanding of injury under the Equal Protection Clause. The very purpose of the Equal Protection Clause is to prevent laws like H.B. 2443, which codify and perpetuate unsupported stereotypes underlying race-based discrimination. *See Wilson*, 122 F.3d at 701; *J.E.B.*, 511 U.S. at 129-31 (decrying "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice" and finding it "axiomatic" that the Equal Protection Clause is violated when the government acts on the basis of these stereotypes). It would be a manifest injustice to pervert the standing doctrine to prevent Appellants from enforcing the Equal Protection guarantees designed to shield them from laws like H.B. 2443, unless they first agreed that the racial prejudices against them have merit.

Such a holding would resonate well beyond this Circuit. Over 60 bills have been introduced since 2009 at the federal or state levels comparable to H.B. 2443. *See* Bills on File with Asian Americans Advancing Justice | AAJC. At least twelve states currently have pending legislation to prohibit sex-selective abortions, and in 2013, two states enacted sex-selective abortion bans. These bills rely on the same set of inconclusive data and perpetuate the racist assumptions underlying H.B.

2443. Many come from model legislation drafted by the anti-choice group Americans United for Life, which factually misrepresents in its policy guide that sex-selective abortions are being "practiced in the United States, often by people who trace their ancestry to [Asian] countries that commonly practice sex-selection abortions." Americans United For Life, Model Legislation & Policy Guide for the 2013 Legislative Year at 2, available at http://www.aul.org/wp-content/uploads/2012/11/Sex-Selective-and-Genetic-Abnormality-Ban-2013-LG.pdf.

Most recently, in March 2014, the South Dakota Legislature passed House Bill 1162, a law that would ban sex-selective abortions. In support of the bill, Representative Don Haggar expressed assumptions regarding the conduct of AAPI women no different from those that were voiced during Arizona's legislative hearings, stating "[t]here are cultures that look at a sex-selection abortion as being culturally okay. . . ." Molly Redden, *GOP Lawmaking: We Need to Ban Sex-Selective Abortions Because of Asian Immigrants*, Mother Jones (Feb. 25, 2014) (quoting Rep. Haggar). Representative Haggar argued that as South Dakota "embrac[ed] individuals from some of those cultures in . . . this state," a sex-selection ban was needed in order to "send a message" that South Dakota is "a state that values life, regardless of its sex." *Id. See also, e.g.*, Press Release, Office of Allen Fletcher, Texas House of Representatives, Jun. 11, 2013, available

at http://www.house.state.tx.us/news/member/press-releases/?id=4616&session=83&district=130&bill_code=2830 ("It is not disputed that the horrifying practice of sex-selective abortion occurs in the world, most notably in countries where institutional and cultural biases encourage it. . . . The United States has become a safe haven for those seeking legal sex-selective abortions.").

Sex-selective abortion bans—and the race-based assumptions underlying them—also have found a national stage. Both the U.S. House of Representatives and Senate are considering bills duplicating H.B. 2443. *See* Prenatal Nondiscrimination Act (PRENDA) of 2013 ("Senate PRENDA Bill"), S. 138, 113th Cong. (2013); PRENDA of 2013, H.R. 447, 113th Cong. (2013). The legislation currently under consideration in the Senate explicitly accuses "[c]ertain segments of the United States population, particularly those segments tracing their ethnic or cultural origins to countries where sex-selection abortion is prevalent" of engaging in sex-selection. Senate PRENDA BILL at § 2(a)(6); *see also id.* at § 2(a)(10) (identifying the "Republic of India [and] the People's Republic of China" as countries whose "recent practices of sex-selective abortion" were condemned by the United Nations).

The emergence of sex-selective abortion bans in other jurisdictions following Arizona points to a larger backdrop of nativist sentiment based on the

same "perpetual foreigner" and "cultural threat" stereotypes that have misguided laws throughout history. A finding that the communities injured by the endorsement of these stereotypes lack standing to challenge these pernicious laws would allow unconstitutional, race-based decisionmaking to proliferate across the country. This flawed reasoning should be rejected.

CONCLUSION

For the reasons set forth above, *amici* support the position of Plaintiffs-Appellants. AAPI women in Arizona, including members of Plaintiff-Appellant National Asian Pacific American Women's Forum, are concretely injured by H.B. 2443. They are entitled to their day in court.

DATED: March 19, 2014

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief contains 6,537 words according to the word count provided by Microsoft Word, as required by Federal Rule of Appellate Procedure 32.

DATED: March 19, 2014

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APPENDIX A

Statements of Interest of *Amici*

Asian & Pacific Islander American Health Forum (APIAHF) (Contact: Deodonne Bhattarai, dbhattarai@apiahf.org; Priscilla Huang, phuang@apiahf.org)

The Asian & Pacific Islander American Health Forum (APIAHF) is a national health justice organization which influences policy, mobilizes communities, and strengthens programs and organizations to improve the health of Asian Americans, Native Hawaiians, and Pacific Islanders. We advocate expanding access to health care, including comprehensive family planning, as a necessary step to achieving health equity and justice for our communities. We oppose policies that subject Asian American women and other women of color to increased scrutiny by their providers.

Asian Law Alliance (ALA) (Contact: Richard Konda, sccala@pacbell.net)

The Asian Law Alliance is a non-profit law office founded in 1977 by law students from Santa Clara University School of Law. ALA's mission is to provide equal access to the justice system to Asian and Pacific Islanders and low income residents of Santa Clara County. ALA provides legal services in the areas of public benefits, civil rights, domestic violence, landlord and tenant law and immigration

law. ALA joins this brief in to ensure that discriminatory laws are not created because they would be unconstitutional and violate equal protection guarantees.

Association of Asian Pacific Community Health Organization (AAPCHO) (Isha Weerasinghe, iweerasinghe@aapcho.org)

The Association of Asian Pacific Community Health Organizations (AAPCHO) is a national association of community health organizations serving medically underserved Asian Americans, Native Hawaiians, and Pacific Islanders. AAPCHO member agencies are located in California, Florida, Georgia, Hawaii, Illinois, Louisiana, Massachusetts, Minnesota, New York, Ohio, Republic of the Marshall Islands, Texas, and Washington. AAPCHO is dedicated to promoting advocacy, collaboration, leadership, access, and civic participation to improve the health status of these groups. AAPCHO shares the collective knowledge and experiences of its members with policy makers at the national, state, and local levels and advocates for culturally and linguistically appropriate health care, including overturning laws based on racial stereotypes that harm women's health.

Asian Pacific American Labor Alliance, AFL-CIO (APALA) (Contact: Greg Cendana, gcendana@apalanet.org; William Chiang, wchiang@apalanet.org)

Asian Pacific American Labor Alliance, AFL-CIO (APALA), founded in 1992, is the first and only national organization of Asian Pacific American (APA) union

members and allies to advance worker, immigrant and civil rights. With over 600,000 APA union members, APALA has 18 chapters and pre-chapters and a national office in Washington, D.C. APALA is committed to organizing the unorganized, mobilizing the Asian American and Pacific Islander community for political action, and building alliances between labor and community. We believe that policy and legislation should expand reproductive freedom and this law does the opposite, particularly for women of color.

Asian Pacific Network of Oregon (APANO) (Joseph Santos-Lyons, joseph@apano.org)

The Asian Pacific American Network of Oregon (APANO) is a statewide, grassroots organization, uniting Asians and Pacific Islanders to achieve social justice. We envision a just and equitable world where Asians and Pacific Islanders are fully engaged in the social, economic and political issues that affect us. Laws that are passed based on racial stereotypes targeting specific communities impact their ability to fully access their rights and participate in a democratic society.

Asian Pacific Community in Action (APCA) (Contact: Kathy Nakagawa, kathynakagawa@yahoo.com)

Asian Pacific Community in Action (APCA) is a non-profit community health organization addressing critical health disparities in the Asian Pacific American

community throughout Arizona. APCA's mission, "Inspiring diverse communities to secure healthier futures," guides our work in ensuring health care equity at all levels. We join in challenging a law that perpetuates racial stereotypes and harms women's health care options.

Asian Women for Health (Contact: Chien-Chi Huang, abch2h@gmail.com)

Asian Women for Health is New England's one and only peer-led, community-based network dedicated to advance Asian women's health and wellness through education, advocacy and support. Asian Women for Health believes Arizona's law perpetuates negative stereotypes about AAPI and Black women, and does nothing to promote racial equality or effectively address son preference, as its supporters claim. We stand in solidarity in support of NAPAWF's legal challenge to Arizona's sex- and race-selective abortion ban.

National Asian Pacific American Families Against Substance Abuse (NAPAFASA) (Contact: Myron Dean Quon, mquon@napafasa.org)

National Asian Pacific American Families Against Substance Abuse (NAPAFASA) is a non-profit membership organization that prevents and reduces substance use disorders and other addictions in Asian American, Native Hawaiian, and Pacific Islander families and communities through research, advocacy, education, and capacity building. NAPAFASA engages in social research and

policy analysis to advance laws and policies that reduce the stigma and shame associated with the usage of prevention, early intervention, and treatment of substance use disorders. Through experience, NAPAFASA asserts that stigma causes measurable and significant injury to individuals' mental and physical well-being and has an interest in the ability of individuals to challenge laws grounded in racial stereotypes that stigmatize entire communities.

National Council of Asian Pacific Islander Physicians (NCAPIP) (Contact: Lloyd Asato, lasato@ncapip.org)

The National Council of Asian Pacific Islander Physicians (NCAPIP) is a national policy advocacy organization that represents physicians committed to the advancement of the health and well-being of Asian American, Native Hawaiian, and Pacific Islander patients. Laws that encourage medical decisions to be made based on racial stereotypes stigmatize their targeted populations as conforming to certain behaviors, perpetuating racism not just within health care settings but other parts of community life. NCAPIP believes that physicians should be proactive partners in addressing racial discrimination to improve community health and to build and preserve trusted relationships between physicians and patients so that medical decisions are informed and privacy is protected.

National Tongan American Society (NTAS) (Contact: Fahina Tavake-Pasi, fahina36@hotmail.com)

National Tongan American Society (NTAS) is a non-profit, community-based organization with a focus on improving the health, education, social justice, and basic overall well-being of Pacific Islanders. NTAS believes that all persons have the rights to be healthy, to live in a thriving community, and to have equal protection as they live their lives. NTAS joins this brief declaring that discriminatory laws are unconstitutional and violate equal protection guarantees and therefore have no place in U.S. laws. NTAS seeks to bring about equality and justice for all.

South Asian Americans Leading Together (SAALT) (Contact: Manar Waheed, manar@saalt.org)

South Asian Americans Leading Together (SAALT) is a national non-profit organization whose mission is to elevate the voices and perspectives of South Asian individuals and organizations to build a more just and inclusive society in the United States. As an organization that is committed to importance of equality and civil rights, SAALT joins this brief in an effort to ensure that discriminatory laws are not created as such discrimination would be unconstitutional and violate equal protection guarantees.

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