

No. 23-10362

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

ALLIANCE FOR HIPPOCRATIC MEDICINE, et al.,

Plaintiffs–Appellees,

v.

FOOD & DRUG ADMINISTRATION, et al.,

Defendants–Appellants,

v.

DANCO LABORATORIES, L.L.C.,

Intervenor–Appellant.

On Appeal from the United States District Court
for the Northern District of Texas

In Case No. 2:22-CV-223-Z before The Honorable Matthew J. Kacsmaryk

**BRIEF OF AMICI CURIAE
FREDERICK DOUGLASS FOUNDATION AND THE
NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE
IN SUPPORT OF APPELLEES AND AFFIRMANCE**

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CERTIFICATE OF INTERESTED PERSONS

No. 23-10362

ALLIANCE FOR HIPPOCRATIC MEDICINE, et al. v.
FOOD & DRUG ADMINISTRATION, et al.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, which are in addition to the persons and entities so listed by the parties and other amici, have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Amici curiae Frederick Douglass Foundation and The National Hispanic Christian Leadership Conference are nonprofit, non-stock corporations. They have no financial interest in the outcome of this case.

/s/ Hugh C. Phillips

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IDENTITIES AND INTERESTS OF AMICI CURIAE

Amici Curiae, Frederick Douglass Foundation and The National Hispanic Christian Leadership Conference, are nonprofit faith organizations that serve members of the African American, Hispanic, and disability communities across the United States. Amici have a strong interest in exposing the racist and eugenic history of the abortion movement, which has had catastrophic effects on their communities. The importance of Amici's argument on this issue has been recognized by the Supreme Court of the United States when citing to Amici's brief in *Dobbs v. Jackson Women's Health Organization* for the argument that abortion disproportionately affects black babies. 142 S. Ct. 2228, 2256 n. 41 (2022). Amici relatedly have a strong interest in challenging the FDA's chemical abortion regimen and approval of mifepristone in order to protect vulnerable communities from genocidal social policies. Given Amici's background and experience in this sensitive area, their perspective is unlikely to be represented by the parties or other amici.

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person—other than Amici Curiae, their members, or their counsel—contributed money intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

The Court should affirm the district court's order of preliminary injunction staying the approval of mifepristone and otherwise grant Appellees' requested relief. Consistent with the constitutional right to life and equal protection guarantees, Amici argue that the district court's order recognizes and protects the profound public interest in protecting against mifepristone's use in performing eugenic abortions.

The record below highlights mifepristone's heavy use as a tool in performing eugenic abortions. Abortion is largely a minority epidemic—and purposefully so. Margaret Sanger and the early abortion movement purposefully attempted to utilize abortion as a means of population control among those populations they considered lesser than White or fully able Americans. This same ideology drove the United States Supreme Court's notorious decision in *Buck v. Bell*, 274 U.S. 200 (1927).

The founding of the Population Council and its advocacy for the FDA's subsequent approval of mifepristone as a method of chemical abortion was based on the same eugenic ideology and is the heritage of today's abortion advocacy movement. Staying mifepristone's approval protects the public interest by preventing the drug from being used in the promotion and implementation of a chemical abortion regimen that indisputably targets

minority and disabled communities to eugenic ends. For these reasons, the Court should affirm the district court's order.

ARGUMENT

The district court's order of preliminary injunction, staying the FDA's approval of mifepristone, should be affirmed. While all four requirements for a preliminary injunction are facially met in this case, the third and fourth factors—which consider the public interest served by a preliminary injunction—particularly favor Appellees. The abortion movement in the United States is rooted in eugenics ideology, which seeks to eradicate those who are deemed unfit or undesirable. The advocacy for mifepristone and its subsequent approval by the FDA is a continuation of that eugenic legacy. Staying mifepristone's approval protects the public interest by preventing use of the drug in a chemical abortion regimen that indisputably targets Black, Hispanic, and disabled communities and furthers a eugenic ideology.

Lead by the proponents of chemical abortion access, the eugenics-based abortion industry denies the fact that all human beings have inherent value and dignity that are bestowed on them by their Creator. Instead, the industry leaves to government decisionmakers and powerful, eugenic organizations like the Population Council to determine if or when human life has worth and value. *Cf. Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., dissenting) (“When

the Framers proclaimed in the Declaration of Independence that ‘all men are created equal’ and ‘endowed by their Creator with certain unalienable Rights,’ they referred to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth.”) The approval of mifepristone has been a continuation of chemical abortion’s use “as a means of effectuating eugenics.” *Box v. Planned Parenthood of Indiana & Kentucky Inc.*, 139 S. Ct. 1780, 1787 (2019) (Thomas, J., concurring). Yet, as the district court noted, “though eugenics were once fashionable in the Commanding Heights and High Court, they hold less purchase after the conflict, carnage, and casualties of the *last* century revealed the bloody consequences of Social Darwinism practiced by would-be Übermenschen.” ROA.4370. The district court’s order should be affirmed and Appellees granted full relief.

I. Chemical and other abortion advocacy rests on the eugenics movement, which is rooted in Social Darwinism and the elimination of undesirable populations.

The approval of mifepristone by the FDA is rooted in modern abortion advocacy, which arose out of the birth control movement and was “developed alongside the American eugenics movement.” *Box* 139 S. Ct. at 1783 (Thomas, J., concurring). Coined in the 1880s by a British scientist who was a cousin of Charles Darwin, “eugenics” is “the science of improving stock through all influences that tend in however remote a degree to give to the more suitable

races or strains of blood a better chance of prevailing speedily over the less suitable than they otherwise would have.” *Id.* at 1784 (Thomas, J., concurring) (cleaned up). Put simply, the sinister goal of the eugenics movement was to eliminate “unfit” and “undesirable” people—those with mental and physical disabilities as well as certain races.

Indeed, Charles Darwin himself did not hide his eugenic inclinations, unabashedly revealing in his writings his insidious racist and white supremacist thinking. As one commentator explained:

It becomes clear that he considers every population that is not white and European to be savage. . . . Darwin explains that the “highest races and the lowest savages” differ in “moral disposition . . . and in intellect.” The idea that white people are more intelligent and moral persists throughout. Darwin’s theory applies survival of the fittest to human races, suggesting that extermination of non-white races is a natural consequence of white Europeans being a superior and more successful race. Not only does Darwin believe in white supremacy, he offers a biological explanation for it, namely that white people are further evolved.^[1]

By the 1920s, the eugenics movement was immensely popular among progressives, professionals, academics, and the medical community.² Many leading figures of the day, including Theodore Roosevelt and John D.

¹ Austin Anderson, *The Dark Side of Darwinism* (Nov. 16, 2016), <https://sites.williams.edu/engl-209-fall16/uncategorized/the-dark-side-of-darwinism/> (last visited Sept. 16, 2022).

² See Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck 2* (2016).

Rockefeller, “were fervent eugenicists, putting their money, their power, their time, and their research behind the effort.”³

Margaret Sanger, founder of amicus curiae for Appellants Planned Parenthood, was one of the most outspoken members of the American eugenics movement. Sanger argued that eugenics was “the most adequate and thorough avenue to the solution of racial, political, and social problems.”⁴ She accordingly praised sterilization as the “remedy” to the problem of “an increasing rate of morons.”⁵ In the first two decades of the twentieth century, a dozen states passed eugenic sterilization laws.⁶ One court even upheld eugenic sterilization as a valid exercise of the state’s police power “based on the growing belief that, due to the alarming increase in the number of degenerates, criminals, feeble-minded, and insane, our race is facing the greatest peril of all time.” *Smith v. Wayne*, 231 Mich. 409, 425 (1925).

Many eugenicists drew “the distinction between the fit and the unfit . . . along racial lines.” *See Box*, 139 S. Ct. at 1785 (Thomas, J., concurring) (citing

³ Jeffrey Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 87 (2018).

⁴ Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, BIRTH CONTROL REV. (Oct. 1921), at 5.

⁵ Margaret Sanger, *The Function of Sterilization*, BIRTH CONTROL REV. (Oct. 1926), at 299.

⁶ *See* Paul Lombardo, *Disability, Eugenics, and the Culture Wars*, 2 ST. LOUIS U. J. HEALTH L. & POL’Y 57, 61 n.33 (2008) (listing 12 states that enacted involuntary sterilization statutes).

examples).⁷ The Immigration Act of 1924 “represented a eugenic (and racist and nativist) attempt to protect the integrity of Anglo-American stock.”⁸ And a disproportionate number of the sterilized individuals, particularly in the South, were minorities. For example, in 1955, South Carolina reported that all 23 persons sterilized at the State Hospital over the previous year were Black women.⁹ In the 1930s and 1940s, the North Carolina Eugenics Commission sterilized nearly 8,000 “mentally deficient persons,” some 5,000 of whom were Black.¹⁰

In *Buck v. Bell*, 274 U.S. 200 (1927), the Supreme Court “threw its prestige behind the eugenics movement.” *Box*, 139 S. Ct. at 1786 (Thomas, J., concurring). In *Buck*, the Court approved the compulsory sterilization of an allegedly “feeble minded” woman who had been falsely adjudged “the probable potential parent of socially inadequate offspring.” 274 U.S. at 205, 207. In a short opinion, Justice Oliver Wendell Holmes, Jr., joined by seven other

⁷ See Lombardo, *supra* note 6, at 76 (noting that Margaret Sanger was open about “voicing her contempt for the poor, disabled and minorities”).

⁸ Corinna Lain, *Three Supreme Court “Failures” and a Story of Supreme Court Success*, 69 VANDERBILT L. REV. 1040 (2019); see also Cohen, *supra* note 2, at 132–35 (discussing role of eugenicists in passing the act).

⁹ See Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 88–89 (1997).

¹⁰ *Id.* (footnote omitted); see also Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of Madrigal v. Quilligan*, in REPRODUCTIVE RIGHTS & JUSTICE STORIES 97, 99 (Melissa Murray et al. eds., 2019) (describing the forced sterilization of Mexican-American women in California into the 1970s).

Justices, “offered a full-throated defense of forced sterilization,” *Box*, 139 S. Ct. at 1786 (Thomas, J., concurring), as a means to “prevent” society from being “swamped with incompetence,” *Buck*, 274 U.S. at 207. In a now, infamous passaged, the Supreme Court declared:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. **Three generations of imbeciles are enough.**

Id. (emphasis added) (citation omitted).

Within five years after *Buck*, 28 states had adopted compulsory sterilization laws; and between 1907 and 1983, more than 60,000 helpless human beings made in the image and likeness of God were involuntarily sterilized.¹¹

¹¹ See Cohen, *supra* note 2, at 299–300, 319; see generally Peter Quinn, *Race Cleansing In America*, 54 AMERICAN HERITAGE 2–3 (2003). Cf. Paul Lombardo, *Three Generations, No Imbeciles: Eugenics, The Supreme Court, and Buck v. Bell* xiii (2008) (“The Buck case represents one of the low points in Supreme Court history—on a par with *Plessy v. Ferguson*, which announced the now-discredited legal doctrine of ‘separate but equal,’ and the *Korematsu* case, which permitted the internment of Japanese citizens during World War I.”); Victoria Nourse, *Buck v. Bell: A Constitutional Tragedy from a Lost World*, 39 PEPP. L. REV. 101, 101 (2011) (“A mere five paragraphs long, *Buck v. Bell* could represent the highest ratio of injustice per word ever signed on to by eight Supreme Court Justices, progressive and conservative alike.”).

II. The Eugenic Era lives on through the modern abortion movement.

“Tragically, . . . the [eugenics] practice continues today with modern-day abortions.” *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 540 (6th Cir. 2021) (Griffin, J., concurring). Indeed, “[f]rom the beginning, birth control and abortion were promoted as means of effectuating eugenics.” *Box*, 139 S. Ct. at 1787 (Thomas, J., concurring); *id.* at 1789 (“Support for abortion can . . . be found throughout the literature on eugenics.”). For example, Margaret Sanger argued that birth control “is really the greatest and most truly eugenic method” of “human generation,” and “its adoption as part of the program of Eugenics would immediately give a concrete and realistic power to that science.”¹² Sanger further argued that “eugenists and others who are laboring for racial betterment” could not “succeed” unless they “first clear[ed] the way for Birth Control.”¹³ Many eugenicists supported legalizing abortion, and abortion advocates—including future Planned Parenthood President Alan Guttmacher—endorsed abortion for eugenic reasons. And as the late Justice Ginsburg once observed: “[A]t the time *Roe* was decided, there was concern about population growth and

¹² Margaret Sanger, *Pivot of Civilization* 189 (1922).

¹³ Margaret Sanger, *Birth Control and Racial Betterment*, BIRTH CONTROL REV. (Feb. 1919), at 11.

particularly growth in populations that we don't want to have too many of. So that *Roe* was going to be then set up for Medicaid funding of abortion.”¹⁴

This eugenic ideology was the very reason for founding of the Population Council and its advocacy of mifepristone and chemical abortion in the United States. Founded in 1952 by John D. Rockefeller, the purpose of the organization was to address “the problem of quality” in the human genome because “modern civilization had reduced the operation of natural selection by saving more weak lives and enabling them to reproduce, thereby resulting in a downward trend in genetic quality.” ROA.4308 n.2 (cleaned up).¹⁵ To address this problem, the Population Council advocated for abortion and contraception and in 1996 applied to the FDA for approval of a new abortion drug, mifepristone. *Id.*

A. The American abortion movement is steeped in racism.

The links between abortion and racist eugenics are manifold. For openers, Margaret Sanger focused her eugenic goal to eliminate “the unfit” minorities. In

¹⁴ Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES MAGAZINE (July 7, 2009), <https://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html>.

¹⁵ Even today, the Rockefeller Brothers Fund describes the history of the Population Council as focused on “the more controversial fields of human fertility and contraceptive research.” Rockefeller Brothers Fund, *The Population Council*, <https://www.rbf.org/about/our-history/timeline/population-council> (last visited May 12, 2023).

promoting birth control, Sanger advanced a “Negro Project,”¹⁶ gave a speech to the Ku Klux Klan,¹⁷ and advocated eugenic breeding for “the gradual suppression, elimination and eventual extinction, of defective stocks—those human weeds which threaten the blooming of the finest flowers of American civilization.”¹⁸ She personally set up birth-control facilities in minority communities, including a clinic in Harlem in 1930.¹⁹ In a personal letter in 1939, Sanger explained her plan to stop Black population growth:

The most successful educational approach to the Negro is through a religious appeal. We do not want word to go out that we want to exterminate the Negro population, and the minister is the man who can straighten out that idea if it occurs to any of their more rebellious members.^[20]

Minority groups have complained for decades that Planned Parenthood targets their communities. For example, a minority field agent complained to former Planned Parenthood president Alan Guttmacher: “Birth control is just a

¹⁶ See Margaret Sanger Papers Project, Newsletter #28, *Birth Control or Race Control? Sanger and the Negro Project* (2001) (hereinafter Sanger Newsletter), http://www.nyu.edu/projects/sanger/articles/bc_or_race_control (last visited Sept. 16, 2022).

¹⁷ See Margaret Sanger, *An Autobiography* 366 (1938).

¹⁸ Margaret Sanger, *Apostle of Birth Control Sees Cause Gaining Here*, N.Y. TIMES (Apr. 8, 1923), at 11.

¹⁹ See Sanger Newsletter, *supra* note 16; see also Mary Ziegler, *Roe's Race: The Supreme Court, Population Control, and Reproductive Justice*, 25 YALE J.L. & FEMINISM 1, 13 (2013) (noting that in its early advocacy for birth control, Planned Parenthood “focused on unwanted children and pathological parenting in poor African American communities”).

²⁰ Sanger Newsletter, *supra* note 16 (citation omitted).

plot just as segregation was a plot to keep blacks down. It is a plot rather than a solution. Instead of working for us and giving us our rights—you reduce us in numbers and do not have to give us anything.”²¹ African American leaders such as Julius Lester, Dick Gregory, Daniel H. Watts, and H. Rap Brown described abortion as “black genocide” and called on Blacks to eschew these practices to avoid “race suicide.”²²

History and data reveal that abortion, and especially chemical abortion, has devastated communities of color. According to one peer-reviewed study, “black women have been experiencing abortions at a rate nearly four times that of white women for more than 30 years.”²³ Dr. James Sherley, one of the study’s authors, commented: “Abortion is the hushed killer of Black life that has silenced

²¹ Donald Critchlow, *Intended Consequences: Birth Control, Abortion, and the Federal Government in Modern America* 61 (1999) (quoting 1966 communication between Planned Parenthood Federation of American (PPFA) field consultant and Alan Guttmacher); see also *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring) (“Some black groups saw ‘family planning’ as a euphemism for race genocide and believed that black people were taking the brunt of the ‘planning’ under Planned Parenthood’s ghetto approach to distributing its services.” (cleaned up)).

²² Critchlow, *supra* note 21, at 142; cf. David Beito & Linda Royster Beito, *Black Maverick: T.R.M. Howard’s Fight for Civil Rights and Economic Power* 215 (2009) (noting some African American civil rights leaders “fretted about the racist implications of abortion”).

²³ James Studnicki et al., *Perceiving and Addressing the Pervasive Racial Disparity in Abortion*, 7 HEALTH SERVS. RESEARCH & MANAGERIAL EPIDEMIOLOGY 1 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7436774/pdf/10.1177_2333392820949743.pdf.

millions of George Floyds before they even took their first breath of air. Today, this is mostly accomplished through use of mifepristone: “over 50 percent of abortions are medication abortions.” ROA.2434, ¶ 30.

The Government all but admitted the eugenic nature of chemical abortions in the district court below when its experts Dr. Jason Lindo, admitted: “People of Color are disproportionately represented among those obtaining abortions. In terms of race, 27.6 percent of people obtaining abortions in 2014 were Black, even though only 14.9 percent of US women aged 15-44 were Black.” ROA.2432, ¶ 26. “[I]n this remarkable moment of social reform history, the lives of Black preborn children have been forgotten.²⁴ And Black women have been lied to and manipulated into believing that Planned Parenthood, abortion providers, and the proponents of mifepristone access have Black women’s best interests at heart.

According to the Centers for Disease Control and Prevention’s most recent data, Black women accounted for 33.6 percent of all reported abortions in 2018, even though they make up 13 percent of women in the United States.²⁵ Black

²⁴ James Sherley, *Preborn Black Lives Matter, Too*, WASH. TIMES (Aug. 2, 2020), <https://www.washingtontimes.com/news/2020/aug/2/preborn-black-lives-matter-too/>.

²⁵ Katherine Kortsmitt et al., *Abortion Surveillance — United States, 2018*, MMWR Surveill. Summ. (Nov. 27, 2020), <https://pubmed.ncbi.nlm.nih.gov/33237897/>; U.S. CENSUS BUREAU, *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin* (2020).

women also had the highest abortion rate (21.2 abortions per 1,000 women) and ratio (335 abortions per 1,000 live births). Further, abortion-induced deaths of the unborn in the Black community are 69 times higher than HIV deaths, 31 times higher than homicides, 3.6 times higher than cancer-related deaths, and 3.5 times higher than deaths caused by heart disease.²⁶

In Mississippi, 3,005 abortions were reported in 2018. Of those abortions, 72% were performed on Black women, compared to just 24% on White women and 4% on women of other races.²⁷ Indeed, the Charlotte Lozier Institute estimates that the Black abortion rate in Mississippi was 8.5 per 1,000 women of childbearing age—over three-and-a-half times the abortion rate of 2.3 per 1,000 for White women.²⁸ Further, as even the Government’s expert admitted below, “24.8 percent of individuals obtaining abortions in 2014 were Hispanic, even though only 20 percent of US residents were Hispanic.” ROA.2432, ¶ 26.

The racial disparity in abortions is largely intentional: A study based on 2010 Census data shows that nearly eight out of ten Planned Parenthood abortion facilities are within walking distance of predominantly Black or Hispanic

²⁶ Kortsmit et al., *supra* note 25, at 8.

²⁷ See Tessa Longbons, *Abortion Reporting: Mississippi (2018)*, CHARLOTTE LOZIER INST. (May 8, 2020), <https://lozierinstitute.org/abortion-reporting-mississippi-2018/>.

²⁸ *Id.*

neighborhoods.²⁹ More specifically, Planned Parenthood intentionally located 86 percent of its abortion facilities in or near minority neighborhoods in the 25 U.S. counties with the most abortions.³⁰ These 25 counties contain 19 percent of the U.S. population, including 28 percent of the Black population and 37 percent of the Hispanic/Latino population. In 12 of these counties, Blacks and Hispanics/Latinos are more than 50 percent of the population. In contrast, Blacks are only 12.6 percent of the U.S. population, and Hispanics and Latinos are 16.3 percent. Planned Parenthood's largest abortion facility in America is situated in the middle of a Black and Hispanic neighborhood within walking distance of a nearby school. Given that Planned Parenthood has strategically opened abortion facilities near minority neighborhoods, the abortion industry's

²⁹ See Susan Enouen, *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., *Racial Targeting and Population Control* 22 (2011), https://issues4life.org/pdfs/racial_targeting_population_control.pdf (reporting that in every state, “population control centers” are in “zip codes with higher percentages of blacks and/or Hispanics than the state’s overall percentage”).

³⁰ See Susan Enouen, *Research Shows Planned Parenthood Expands Targeting Minorities as it Spurns Racist Founder*, TOWNHALL (Sep. 23, 2020), <https://townhall.com/columnists/susanwillkeenouen/2020/09/23/research-shows-planned-parenthood-expands-targeting-minorities-as-it-spurns-racist-founder-n2576680>.

attempt to deny its eugenic aims and racist roots cannot withstand objective scrutiny.³¹

Mifepristone and medication abortion are crucial tools of these facilities. Thirty-one percent of abortion facilities described above offer exclusively chemical abortions using mifepristone as part of their regimens. ROA.2437, ¶ 38. Further, mifepristone’s use has skyrocketed to the extent that currently 67.9% of all early term abortions occur through chemical abortions, usually using mifepristone. ROA.2436–37, ¶¶ 34–37.

In short, Margaret Sanger believed, as did her Eugenics Era colleagues, that the “unfit” and “feeble-minded” were a menace to society. And in all contexts, these terms were code words for the poor, Blacks, disabled, and other minorities. Sanger clearly believed that these “undesirable” people should not reproduce and thus advocated for their sterilization.³² Today, the mifepristone chemical abortion regimen is the preferred means of perpetuating this shameful legacy. ROA.2434, ¶ 30.

³¹ See Crutcher et al., *supra* note 29, at 4 (noting “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).

³² See generally Margaret Sanger, *My Way to Peace*, Address to the New History Society (Jan. 17, 1932).

B. Modern abortion policy promotes the eradication of preborn children with Down syndrome and other disabilities.

In March, millions across the globe celebrated World Down Syndrome Day, an annual observance on March 21 started by the United Nations in part to “ensur[e] and promot[e] the full realization of all human rights and fundamental freedoms for all persons with disabilities.”³³ Yet in recent years, due to the “abortion-on-demand” movement and advances in prenatal screening technology, unborn children with Down syndrome and other genetic disabilities are increasingly being destroyed, usually through the use of mifepristone and chemical abortion.

This practice is morally and ethically wrong. Aborting children based on prenatal diagnosis of Down syndrome is effectively promoting eugenics. It also sends a message to society that individuals with Down syndrome are less valuable and less deserving of life than those without the condition. This is a dangerous precedent to set, as it leads to a devaluation of human life and an erosion of the rights of individuals with disabilities.³⁴ Accordingly, the district

³³ See U.N. GAOR RES. 66/149, ¶ 3 (Dec. 19, 2011) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N11/467/76/PDF/N1146776.pdf>.

³⁴ Sadly, the American Medical Association has endorsed disability selective abortion at least since 1967. See American Medical Association, House of Delegates Proceedings, Annual Convention 1967 40, 50 (adopting as policy “an occasional obstetric patient . . . would warrant the instituion [sic] of therapeutic abortion . . . to prevent the birth of a severely crippled, deformed or abnormal infant”).

court was justified in protecting the public interest through the issuance of a preliminary injunction, thereby “preventing abortion from [further] becoming a tool of modern-day eugenics” against the disabled. *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

As discussed above, abortion is used as “a disturbingly effective tool for implementing the discriminatory preferences that undergird eugenics.” *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring) (citing examples). As Justice Thomas presciently observed, today’s “[t]echnological advances have only heightened the eugenic potential for abortion, as abortion can now be used to eliminate children with unwanted characteristics, such as a particular sex or disability.” *Id.* at 1784 (Thomas, J., concurring) (citing examples).³⁵ This observation is not drawn from a dystopian novel but from the real world. Data from the United States and Europe show that over 92% of parents who learn through prenatal

³⁵ Cell-free DNA testing enables genetic screening through a simple blood draw during the first trimester. The American College of Obstetricians and Gynecologists recommends offering cell-free testing for Down syndrome to all pregnant women “as early as possible in pregnancy, ideally at the first obstetric visit.” Am. Coll. of Obstetricians & Gynecologists, *Practice Bulletin 162: Prenatal Diagnostic Testing for Genetic Disorders* (May 2016); Appellants see a much wider public interest in the protection of mifepristone’s availability for the eradication of unwanted children and decreasing the rates of children who will “have more behavioral and social issues” and “lower earnings as adults, poorer health, and increased likelihood of criminal involvement.” ROA.4370 (cleaned up); *see also* ROA.2440–451, ¶¶ 46–80.

genetic testing that their child has Down syndrome opt to abort the baby.³⁶ Indeed, Iceland and Denmark have nearly eliminated all children with Down syndrome through selective abortion. Since prenatal screening was introduced in Iceland, “close to 100 percent” of preborn children diagnosed with Down syndrome are aborted.³⁷ The one or two babies with Down syndrome who survive to birth do so because, as one Icelandic doctor disturbingly observed, “we didn’t find them in our screening.”³⁸

Nor is the eugenic application of abortion in the United States merely hypothetical: An estimated 67% of babies with Down syndrome are aborted in our country. *See Box*, 139 S. Ct. at 1783, 1790 (Thomas, J., concurring). Other studies estimate that 80% of women who learn of a Down syndrome diagnosis before 24 weeks abort their babies.³⁹ Furthermore, a review of nine hospital-

³⁶ See Caroline Mansfield et al., *Termination Rates After Prenatal Diagnosis of Down Syndrome, Spina Bifida, Anencephaly, and Turner and Klinefelter Syndromes: A Systematic Literature Review. European Concerted Action: DADA (Decision-making After the Diagnosis of a fetal Abnormality)*, 19 *PRENATAL DIAGNOSIS* 808, 810 (1999).

³⁷ Julian Quinones & Arijeta Lajka, “*What Kind of Society Do You Want to Live in?*”: *Inside the Country Where Down Syndrome is Disappearing*, CBS NEWS (Aug. 14, 2017), <https://www.cbsnews.com/news/down-syndrome-iceland/>.

³⁸ Dave Maclean, *Iceland Close to Becoming First Country Where No Down’s Syndrome Children Are Born*, INDEPENDENT (Aug. 16, 2017), <https://www.independent.co.uk/lifestyle/health-and-families/iceland-downs-syndrome-no-children-born-first-countryworld-screening-a7895996.html>.

³⁹ Susan Donaldson James, *Down Syndrome Births are Down in the U.S.*, ABC NEWS (Oct. 30, 2009), <https://abcnews.go.com/>

based studies indicates that over 85% of babies are aborted following a prenatal diagnosis of Down syndrome.⁴⁰ This review also suggests that higher abortion rates following a Down syndrome diagnosis “were consistently associated with earlier gestational age,” with one study reporting that 93% of women at 16 or fewer weeks into their pregnancies aborted their babies compared to 85% at 17 or more weeks.⁴¹ Even more alarming, an anonymous survey of nearly 500 physicians who had delivered after prenatal diagnoses revealed that 13% of the providers emphasized the negative aspects of Down syndrome so that parents would favor abortion and 10% actively “urge” parents to abort.⁴² In short, the eugenic use of abortion in America is not an overblown conspiracy theory promoted by pro-life activists—it is actually happening. The district court’s order thus advances the immediate compelling interest in “preventing abortion from becoming a tool of modern-day eugenics.” *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

Health/w_ParentingResource/down-syndrome-births-dropus-women-abort/story?id=8960803.

⁴⁰ Jaime L. Natoli et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995-2011)*, 32:2 *PRENATAL DIAGNOSIS* 142, 147 (2012).

⁴¹ *Supra* note 40 at 149.

⁴² Brian G. Skotko, *Prenatally Diagnosed Down Syndrome: Mothers Who Continued Their Pregnancies Evaluate Their Health Care Providers*, 192 *AM. J. OF OBSTETRICS & GYNECOLOGY* 670, 670–71 (Nov. 2004).

Critically, individuals with Down syndrome offer much to society and are a joy to their loved ones. A 2011 Harvard study found that “[a]mong those surveyed, nearly 99% of people with DS indicated that they were happy with their lives, 97% liked who they are, and 96% liked how they look. Nearly 99% of people with DS expressed love for their families, and 97% liked their brothers and sisters.”⁴³ Children’s Hospital Boston also found that 99% of parents or guardians loved their child with Down syndrome, and 79% “felt their outlook on life was more positive because of their child.”⁴⁴ The same study found that 94% of siblings 12 years and older reported that they were proud of their brother or sister with Down syndrome, and 88% said that they were better persons because of their sibling.

Despite their limitations, children with Down syndrome can achieve great things. Take Karen Gaffney, for example. Gaffney has Down syndrome, yet she earned a two-year Associates of Science degree from Portland Community College, successfully swam the English Channel as part of a six-person relay team, and swam nine miles across Lake Tahoe in 59-degree water to raise money

⁴³ Brian G. Skotko et al., *Self-Perceptions from People with Down Syndrome*, AM. J. MED. GENETICS 2360, 2360, 2364 (Oct. 2011).

⁴⁴ Press Release, Children’s Hospital Boston, *Parents Siblings and People With Down Syndrome Report Positive Experiences* (Sept. 23, 2011), available at <https://medicalxpress.com/news/2011-09-parents-siblings-people-syndrome-positive.html>.

for the National Down Syndrome Congress.⁴⁵ On top of that, she leads a nonprofit foundation dedicated to advocating for those with Down syndrome. Her message is simple: “Down Syndrome Is a Life Meant to Be Saved!”⁴⁶ Other children with Down syndrome have gone on to perform at Carnegie Hall, launch a fashion label, and open a restaurant.⁴⁷ In short, people with Down syndrome have contributed to society in meaningful ways. By advocating for permissive abortion laws and access to mifepristone as the favored means of abortion in early pregnancy, Appellants are facilitating the eradication of human beings who have the potential to enrich our communities and foster compassion for vulnerable populations.

The district court’s preliminary injunction order counteracts the nefarious eugenicist agenda that targets children with Down syndrome. At a minimum, this order aligns with the key public interest in and federal policy of protecting people with disabilities. *See generally* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; Individuals with Disabilities Education Improvement Act of 2004, Pub. L. No 108-446, 118 Stat. 2647. By contrast,

⁴⁵ Karen Gaffney Foundation, *Karen’s Story*, <https://karengaffneyfoundation.org/karens-story/> (last visited Mar. 23, 2023).

⁴⁶ *Id.*

⁴⁷ Zoe Ettinger, *13 People with Down Syndrome Who Are Breaking Barriers in Entertainment, Athletics, Fashion, and More*, INSIDER (Mar. 10, 2020), <https://www.insider.com/people-with-down-syndrome-breaking-barriers>.

Appellant’s position—which necessarily advocates for the widespread availability of mifepristone for the purpose of selective abortions—promotes disability discrimination and threatens to eradicate a group of individuals with unique abilities and experiences.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court’s order and grant Appellees full relief.

Dated this May 12, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). Not counting the items excluded from the length by Fed. R. App. P. 32(f), this document contains 5,172 words. Further, this document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) as well as the requirements of 5TH CIR. R. 28 and 30. This document has been prepared using Microsoft Word in 14-point Calisto MT font.

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I hereby certify that a true and correct copy of the foregoing was electronically filed on May 12, 2023 with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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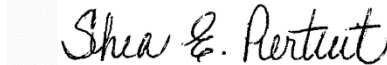
Dear Mr. Phillips,

The following pertains to your brief electronically filed on May 13, 2023.

You must electronically file a "Form for Appearance of Counsel" within 5 days from this date. You must name each party you represent, see **FED. R. APP. P.** 12(b) and **5TH CIR. R.** 12 & 46.3. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, the brief will be stricken and returned unfiled.

Sincerely,

LYLE W. CAYCE, Clerk



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