

No. 18-1171

In the
Supreme Court of the United States

COMCAST CORPORATION,
Petitioners,

v.

NATIONAL ASSOCIATION OF AFRICAN
AMERICAN-OWNED MEDIA, ET AL.,
Respondents

*On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit*

**BRIEF OF AMICUS CURIAE
ISSUES4LIFE FOUNDATION,
IN SUPPORT OF RESPONDENTS.**

CATHERINE W. SHORT
Counsel of Record
ALEXANDRA SNYDER
ALLISON K. ARANDA
Life Legal Defense Foundation
PO Box 2105
Napa, CA 92544
(707) 224-6675
LLDFOjai@cs.com
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CONTENTSi

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS.....1

SUMMARY OF THE ARGUMENT2

ARGUMENT3

 I. A BUT-FOR CAUSATION STANDARD
 ALLOWS FOR THE PERPETUATION OF
 RACIAL DISCRIMINATION BEGINNING AT
 CONCEPTION.3

 A. Eugenics based on race is inexorably
 linked to the founding of Planned
 Parenthood.5

 B. Eugenics continues to motivate Planned
 Parenthood and the abortion industry.....8

 C. Planned Parenthood and the abortion
 industry continue to demonstrate
 discriminatory intent against Black
 Americans.....10

 II. A BUT-FOR CAUSATION STANDARD
 FAILS TO ADEQUATELY REMEDY THE
 HARMFUL EFFECTS OF RACIAL
 DISCRIMINATION.....14

CONCLUSION.....21

TABLE OF AUTHORITIES

CASES

<i>Box v. Planned Parenthood of Ind. & Ky., Inc.</i> , 139 S. Ct. 1780 (2019)	passim
<i>Nat'l Ass'n of African Am.-Owned Media v. Charter Communications., Inc.</i> , 915 F.3d 617 (9th Cir. 2019)	16, 18

FEDERAL STATUTES

42 U.S.C. § 1981	2, 3, 4, 22
------------------------	-------------

STATE STATUTES

Ind. Code §16–41–16–4(d)	3
--------------------------------	---

OTHER AUTHORITIES

Brent Rooney et al., <i>Does Induced Abortion Account for Racial Disparity in Preterm Births, and Violate the Nuremberg Code?</i> , J. AM. PHYS. & SURGEONS, Winter 2008	12, 15
Brian D. Smedley, et. al., <i>Unequal Treatment: Confronting Racial And Ethnic Disparities In Health Care</i> , National Academies Press, at pp. 13, 15 (2003), available at https://www.nap.edu/read/10260/chapter/1	17
Caroline May, <i>Pro-choicers demonstrate: 'Abortion on demand and without apology!'</i> , Daily Caller (January 24, 2012), available at https://dailycaller.com/2012/01/24/pro-choicers-demonstrate-abortion-on-demand-and-without-apology/	19

- Centers for Disease Control and Prevention,
Morbidity and Mortality Weekly Report,
 (November 23, 2018) available at
<https://www.cdc.gov/mmwr/volumes/67/ss/pdfs/ss6713a1-H.pdf> 13
- Ernst Rudin, *Eugenic Sterilization: An Urgent Need*, Birth Control Review (1933), available at
<https://lifedynamics.com/app/uploads/2015/09/1933-04-April.pdf> 5
- Extremist files: Garrett Hardin*, Southern Poverty Law Center, available at
<https://www.splcenter.org/fighting-hate/extremist-files/individual/garrett-hardin>..... 9
- Fabien Locher, *Cold War Pastures: Garrett Hardin and the ‘Tragedy of the Commons,’* Revue D’Histoire Moderne et Contemporaine (2013) available at https://www.cairn-int.info/article-E_RHMC_601_0007--cold-war-pastures-garrett-hardin-and.htm 9
- In Memoriam, University of California Santa Barbara (2003), available at
https://senate.universityofcalifornia.edu/_files/inmemoriam/html/garretthardin.htm 9
- Interview with William Shockley, The Firing Line (June 20, 1974), available at
<https://www.youtube.com/watch?v=7JOIqkh2ms8&t=3116> 8
- James A. Miller, *Betting with lives: Clarence Gamble and the Pathfinder International*, available at <https://www.pop.org/betting-with-lives-clarence-gamble-and-the->

pathfinder-international/#endnote_anchor-16	6
Lainey Newman, <i>Safe, Legal, and Rare: The Democrats' Evolving Stance on Abortion</i> , Harvard Political Review (January 11, 2018), available at https://harvardpolitics.com/united-states/safe-legal-and-rare-the-democrats-evolving-stance-on-abortion/	19
Lothrop Stoddard, <i>The Rising Tide of Color Against White World-Supremacy</i> (1920).....	5
Lyman Stone, <i>Baby Bust: Fertility is Declining the Most Among Minority Women</i> (May 16, 2018), available at https://ifstudies.org/blog/baby-bust-fertility-is-declining-the-most-among-minority-women	14
Margaret Sanger letter to C. J. Gamble, 1939 (https://libex.smith.edu/omeka/files/original/d6358bc3053c93183295bf2df1c0c931.pdf)	6
Margaret Sanger, <i>Birth Control and Racial Betterment</i> , Feb. 1919, Library of Congress Microfilm 131:0099B, available at https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=143449.xml	7
Margaret Sanger, <i>Birth Control and Society</i> , (April - June 1916), available at https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=101859.xml	18
Margaret Sanger, <i>Highlights in the History of Birth Control</i> , Oct. 1923, available at https://www.nyu.edu/projects/sanger/webedit	

ion/app/documents/show.php?sangerDoc=306641.xml	10
Mark Crutcher et al., Life Dynamics Inc., <i>Racial Targeting and Population Control</i> (2011), available at https://www.lifenews.com/wp-content/uploads/2011/08/LifeDynamicsRacialReport.pdf	11
Planned Parenthood Federation of America, Inc., <i>Opposition Claims About Margaret Sanger</i> (2004), available at https://www.plannedparenthood.org/files/8013/9611/6937/Opposition_Claims_About_Margaret_Sanger.pdf	10, 20
Planned Parenthood Federation of America, <i>Margaret Sanger—Our Founder Fact Sheet</i> , (October 2016), available at	20
Rachel K. Jones, PhD and Kavanaugh, Megan L., <i>Changes in Abortion Rates Between 2000 and 2008 and Lifetime Incidence of Abortion</i> , <i>Obstetrics & Gynecology</i> : June 2011 - Volume 117 - Issue 6	12
<i>State Facts about Abortion: Indiana</i> , Guttmacher Institute (May 2018) available at https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-indiana	14
Summary of Vital Statistics 2016: The City of New York, Bureau of Vital Statistics, available at https://www1.nyc.gov/assets/doh/downloads/pdf/vs/2016sum.pdf	12
Tessa Longbons, <i>Abortion Reporting: New York City (2016)</i> , Dec. 19, 2018, available at https://lozierinstitute.org/abortion-reporting-new-york-city-2016/	12

Tonse N.K. Raju, et al., <i>Long-Term Healthcare Outcomes of Preterm Birth: An Executive Summary of a Conference Sponsored by the National Institutes of Health</i> , <i>The Journal of Pediatrics</i> (February 2017), available at https://www.jpeds.com/article/S0022-3476(16)31083-6/fulltext	16
United States Census Bureau, <i>Quick Facts: Indiana</i> , available at https://www.census.gov/quickfacts/in	14
United States Census Bureau, <i>Quick Facts: New York</i> , available at https://www.census.gov/quickfacts/NY	13
Vernita, <i>Birth Outcome Disparities Among Black Women</i> , March 2, 2018, available at https://www.plannedparenthood.org/planned-parenthood-pacific-southwest/blog/birth-outcome-disparities-among-black-women...	16
William H. Tucker, <i>The Science and Politics of Racial Research</i> (1996).....	6

INTEREST OF AMICUS¹

The **Issues4life Foundation** works with Black American leaders nationwide to strengthen their stand against abortion on demand and resolve the questions surrounding the bioethical issues that impact our humanity. They are committed to protecting both the civil and human rights of the child in the womb by recognizing the inherent dignity and unalienable rights of all members of the human family, so that in law and in practice every life is valued. Issues4Life Foundation's Founder and President, Rev. Walter B. Hoye II and his wife Lori Hoye have personally suffered racial discrimination, including media bias. The Hoyes work tirelessly to eliminate discrimination from present-day America, beginning with children in the womb. Walter and Lori Hoye are grieved at the destruction of the Black community, the Black family, and the Black birth rate at the hands of the abortion industry, which disproportionately targets its services to Black women. Issues4Life's mission is to end abortion by raising awareness of the impact of abortion and the implementation of unethical biotechnology.

¹ Counsel of record for both parties filed notices of blanket consent for *amicus curiae* briefs. No counsel for any party authored this brief in whole or in part. No party or counsel for any party made any financial contribution toward the preparation of submission of the brief.

SUMMARY OF THE ARGUMENT

Black Americans are confronted daily with racial bias leading to inequitable outcomes. In the case at hand, Entertainment Studies Networks, Inc (“ESN”) alleges it was denied contracts by Comcast based, at least in part, on racial discrimination in violation of 42 U.S.C. § 1981. Comcast moved to dismiss; however, the district court found that ESN’s complaint sufficiently pleaded a § 1981 claim. The Ninth Circuit Court of Appeals affirmed, holding that “If discriminatory intent plays *any* role in a defendant’s decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the *same right* as a white citizen.”

Comcast is asking this Court to reverse the Ninth Circuit Court of Appeal’s ruling that a claim of race discrimination under 42 U.S.C. § 1981 turns on a motivating factor standard, not a but-for causation standard.

The Issues4Life Foundation takes this opportunity to remind the Court that the Civil Rights Act of 1866, which is embodied in section 1981, was enacted to ensure that Black Americans would have the full rights of citizenry following the Thirteenth and Fourteenth Amendments. Although the Thirteenth Amendment granted freedom to slaves, Blacks remained subject to discriminatory laws and practices, including the Black Codes, which continued to suppress Black participation in free society well after slavery was abolished. Did the Civil Rights Act of 1866 achieve its intended

aim? Amicus know that, as far as unborn Black Americans, the promise is still unfulfilled.

While the case at bar is not specifically about abortion, we can demonstrate that the discriminatory beliefs and practices exhibited by the abortion industry under the leadership of Planned Parenthood are examples of the type of discriminatory intent that diminish the civil rights of Blacks in all spheres. These are precisely the attitudes the drafters of the Civil Rights Act sought to eradicate.

ARGUMENT

I. A BUT-FOR CAUSATION STANDARD ALLOWS FOR THE PERPETUATION OF RACIAL DISCRIMINATION BEGINNING AT CONCEPTION.

The application of a but-for standard of causation would require victims of discrimination to prove that racial discrimination is the only factor in denying civil rights, including the right to contract, to sue, and to “the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.” 42 U.S.C. § 1981. This disregards our nation’s long history of racial discrimination that the Civil Rights Act of 1866 and the Thirteenth, Fourteenth, and Fifteenth Amendments sought to remedy.

This Court recently upheld a provision of an Indiana statute requiring the humane disposal of aborted fetal remains. Ind. Code §16–41–16–4(d).

The Indiana law also includes a provision that prohibits abortion providers from terminating pregnancies in cases where the abortion is sought because of a baby's race, sex, or disability. This provision, the "Sex Selective and Disability Abortion Ban," has been enjoined by the Seventh Circuit Court of Appeals and this Court has thus far declined the State of Indiana's petition for review. However, Justice Thomas, in his concurring opinion, recognizes that the time has come to address the problem of discrimination against Blacks that is so pervasive that many are prevented "from being born in the first place." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019).

As Justice Thomas points out in his concurring opinion in *Box*, less than 100 years ago, the suppression and even eradication of entire communities of Black Americans was not only contemplated but planned for by leading academics. "Leaders in the eugenics movement held prominent positions at Harvard, Stanford, and Yale, among other schools, and eugenics was taught at 376 universities and colleges." Sixty years after the passage of the 1866 Civil Rights Act that is embodied in 42 U.S.C. § 1981, eugenics along racial lines was encouraged by some of our nation's leading academics, many of whom believed whites to be intellectually superior to Blacks. They believed a rising Black birth rate would precipitate what eugenicist Lothrop Stoddard termed the "Crisis of the Ages." Tragically these eugenic, inherently discriminatory, ideas are still with us.

A. Eugenics based on race is inexorably linked to the founding of Planned Parenthood.

In 1921, Margaret Sanger founded the American Birth Control League (ABCL) along with founding directors Clarence Cook “C.C.” Little, who served as President of the American Eugenics Society, and Lothrop Stoddard, a white supremacist who published his book “*The Rising Tide of Color Against White World-Supremacy*” in 1920. The ABCL would eventually become the Birth Control Federation of America, which was renamed Planned Parenthood Federation of America in 1942.

Sanger believed she had found the solution to Stoddard’s “Crisis of the Ages” in birth control. In a 1919 article, she appealed to eugenicists to lend their support to birth control as the vehicle for “racial betterment.” Sanger’s objective was to eliminate the “unfit,” while striving to “Create a Race of Thoroughbreds,” which was the tagline for her magazine *The Birth Control Review*.

Sanger published countless articles on eugenics and racial cleansing in *The Birth Control Review*, including “Eugenic Sterilization: An Urgent Need” by Dr. Ernst Rudin in 1933. Ernst Rudin, *Eugenic Sterilization: An Urgent Need*, *Birth Control Review* (1933), available at <https://lifedynamics.com/app/uploads/2015/09/1933-04-April.pdf>. Rudin was the architect of the racial policy in Nazi Germany known as *Rassenhygiene* or racial hygiene and praised Adolf Hitler as the one who through whom “our 30 year long dream of

translating *Rassenhygiene* into action finally become a reality.” William H. Tucker, *The Science and Politics of Racial Research* 121 (1996).

In 1939, Margaret Sanger initiated the “Negro Project” to educate Blacks about birth control and thereby reduce the birth rate among Black Americans. She sought help from her friend Clarence Gamble, heir to the Proctor and Gamble fortune. Gamble had already been funding birth control clinics in North Carolina in order to “improve North Carolinas next generation by correcting the present undesirable differential birth rate...” James A. Miller, *Betting with lives: Clarence Gamble and the Pathfinder International*, available at https://www.pop.org/betting-with-lives-clarence-gamble-and-the-pathfinder-international/#endnote_anchor-16.

Sanger wrote to Gamble about her ideas for the Negro Project, which included enlisting the support of Black doctors as well as Black clergy members who Sanger believed to be essential to the success of her project. In a December 10, 1939 letter to Gamble, Sanger wrote, “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 ever occurs to any of their more rebellious members.” Margaret Sanger letter to C. J. Gamble, 1939 (<https://libex.smith.edu/omeka/files/original/d6358bc3053c93183295bf2df1c0c931.pdf>).

The idea that Sanger would “want to exterminate the Negro population” came from her own writings, particularly her article Birth Control and Racial Betterment where she proudly admitted

that her goal was “stopping not only the reproduction of the unfit but upon stopping *all reproduction* [emphasis added] when there is not economic means of providing proper care for those who are born in health.” Margaret Sanger, *Birth Control and Racial Betterment*, Feb. 1919, Library of Congress Microfilm 131:0099B, available at <https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=143449.xml>.

In his concurring opinion in *Box*, Justice Thomas notes that “[l]ike many elites of her day, Sanger accepted that eugenics was ‘the most adequate and thorough avenue to the solution of racial, political and social problems.’” *Box v. Planned Parenthood*, *supra*, at 1787, quoting Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, *Birth Control Rev.*, Oct. 1921, p. 5. Thomas also notes that while Sanger did not explicitly endorse abortion as a tool of racial cleansing, her “arguments about the eugenic value of birth control in securing ‘the elimination of the unfit,’ *Racial Betterment* 11, apply with even greater force to abortion, making it significantly more effective as a tool of eugenics.” *Id.* at 1789.

Following Sanger’s lead, Alan Guttmacher, Vice-President of the American Eugenics Society, became president of Planned Parenthood and, according to Justice Thomas, “explicitly endorsed eugenic reasons for abortion.” *Box v. Planned Parenthood*, *supra*, at 1789. Planned Parenthood named its research arm The Guttmacher Institute after Alan Guttmacher.

B. Eugenics continues to motivate Planned Parenthood and the abortion industry.

Frederick Jaffe founded what would become the Guttmacher Institute in 1968, after having served as a Planned Parenthood Director and Vice President. Jaffe authored the now infamous memo bearing his name to Population Council President Bernard Berelson, who sought “necessary and useful activities relevant to formation of population policy.” The Jaffe memo includes a table of proposals to curb population growth, including paid sterilization, paid abortion, and adding “fertility control agents” to the water supply. Jaffe names several sources for the proposals, including physicist William Shockley. In 1974, William F. Buckley interviewed Shockley on *The Firing Line* and asked him about racial differences, to which Shockley responded:

“My research leads me inescapably to the opinion that the major cause of the American Negro's intellectual and social deficits is hereditary and racially genetic in origin and, thus, not remediable to a major degree by practical improvements in the environment.”

Interview with William Shockley, *The Firing Line* (June 20, 1974), available at <https://www.youtube.com/watch?v=7JOIqkh2ms8&t=3116>.

Since 1966, Planned Parenthood has issued its annual Margaret Sanger Award, termed the organization’s “highest honor.” In 1978, that “honor” was bestowed on Frederick Jaffe.

In 1980, the award went to ecologist and author Garrett Hardin, whose writings the Southern Poverty Law Center (SPLC) calls “frank in their racism and quasi-fascist ethnonationalism.” Southern Poverty Law Center, *Extremist files: Garrett Hardin*, Southern Poverty Law Center, available at <https://www.splcenter.org/fighting-hate/extremist-files/individual/garrett-hardin>. Hardin, an outspoken opponent of ethnic diversity, and his wife were “deeply involved in Planned Parenthood.” In Memoriam, University of California Santa Barbara (2003), available at https://senate.universityofcalifornia.edu/_files/inmemoriam/html/garretthardin.htm

Hardin was also a long-term member and vice-president of the American Eugenics Society in the 1970’s. He was a strident proponent of government coercion, including forced sterilization, to curb population growth. Fabien Locher, *Cold War Pastures: Garrett Hardin and the ‘Tragedy of the Commons,’* *Revue D’Histoire Moderne et Contemporaine* (2013) available at https://www.cairn-int.info/article-E_RHMC_601_0007--cold-war-pastures-garrett-hardin-and.htm. In 1994, Hardin was a signatory to “Mainstream Science on Intelligence,” a Wall Street Journal op-ed, claiming that “the average IQ among the Black population was only 85.” The SPLC notes that Hardin’s “beliefs about Black intellectual inferiority take on even darker connotations” given that he endorsed forced sterilization of “all feeble-minded individuals” in a biology textbook he authored.

Planned Parenthood continues to issue the Margaret Sanger award to this day and reveres Sanger's "visionary accomplishments," including the Negro Project. Planned Parenthood Federation of America, Inc., *Opposition Claims About Margaret Sanger* (2004), available at https://www.plannedparenthood.org/files/8013/9611/6937/Opposition_Claims_About_Margaret_Sanger.pdf.

C. Planned Parenthood and the abortion industry continue to demonstrate discriminatory intent against Black Americans.

Margaret Sanger used a variety of pejoratives for those whose populations were candidates for "gradual suppression, elimination, and eventual extinction." Among her favorites were "the unfit," "human weeds," "the feeble-minded," "incompetent masses," and "the defective." While Sanger did not use these terms exclusive to apply to Black Americans, her writings on racial cleansing and her associations with avowed racists and eugenists demonstrate that race was a significant motivating factor in her eugenic zeal. Margaret Sanger, *Highlights in the History of Birth Control*, Oct. 1923, available at <https://www.nyu.edu/projects/sanger/webedition/ap/p/documents/show.php?sangerDoc=306641.xml>.

Planned Parenthood has continued the legacy of its founder by targeting its services largely to communities of color, particularly Black and Hispanic communities. In 2011, a team of

researchers sought to determine the extent to which Planned Parenthood placed its facilities in these communities.

Notably, the researchers included the zip codes of all Planned Parenthood facilities in their study, rather than taking a sample, in order to avoid selection bias. Researchers then calculated how often those zip codes “contain a higher proportion of Blacks and/or Hispanics than the state in which they are located.” The study found that zip codes in which Planned Parenthood placed their facilities are “more than two-and-a-half times as likely to be disproportionately minority as not.” For example, nearly 80% of Texas Planned Parenthood facilities were in disproportionately Black and/or Hispanic communities. In North Carolina, where Margaret Sanger launched her “Negro Project,” seven of the state’s nine Planned Parenthood clinics are in disproportionately Black and/or Hispanic communities. Mark Crutcher et al., Life Dynamics Inc., *Racial Targeting and Population Control* (2011) at p. 2-3, available at <https://www.lifenews.com/wp-content/uploads/2011/08/LifeDynamicsRacialReport.pdf>.

The effect of the abortion industry’s aggressive targeting of Black communities is a higher than average abortion rate among Black women. “In 2004, 38.2% of all U.S. surgical abortions were performed on Black women, who comprise about 12.5% of the U.S. female population. This means that the abortion rate in Blacks is 4.3 times as high as in non-Blacks.” Brent Rooney et al., *Does Induced Abortion Account for*

Racial Disparity in Preterm Births, and Violate the Nuremberg Code?, J. AM. PHYS. & SURGEONS, Winter 2008, at 102. According to a 2011 study, this is par for the course, as Black women “have been typically been overrepresented among abortion patients.” Rachel K. Jones and Kavanaugh, Megan L., *Changes in Abortion Rates Between 2000 and 2008 and Lifetime Incidence of Abortion*, *Obstetrics & Gynecology*: June 2011 - Volume 117 - Issue 6 - p 1358-1366.

In New York City, more Black children are aborted than born, according to an analysis of New York City’s 2016 Vital Statistics Report. Summary of Vital Statistics 2016: The City of New York, Bureau of Vital Statistics, available at <https://www1.nyc.gov/assets/doh/downloads/pdf/vs/2016sum.pdf>. “Out of the 47,718 total reported pregnancies experienced by non-Hispanic Black women, almost half – 49 percent – ended in abortion, while four percent ended in miscarriage and only 47 percent ended in live births.” Tessa Longbons, *Abortion Reporting: New York City (2016)*, Dec. 19, 2018, available at <https://lozierinstitute.org/abortion-reporting-new-york-city-2016/>.

According to the Guttmacher Institute, “no racial ethnic group made up a majority of women” who obtained abortions in 2014, the most recent year for which such data is available. “Some 39% of women obtaining abortions were white, 28% were Black, 25% were Hispanic and 9% were of other racial or ethnic backgrounds.” However, the Guttmacher Institute’s attempt to blur racial distinctions in abortion reporting fails to take into

account that according to the latest U.S. Census Bureau data, 69.7% of New York's population is white, while only 17.6% is Black. United States Census Bureau, *Quick Facts: New York*, available at <https://www.census.gov/quickfacts/NY>. In New York, as elsewhere across the nation, abortion disproportionately affects Black women.

Yet this did not stop Planned Parenthood's lobbyists from securing the passage of New York's Reproductive Health Act (RHA) last year. In short, the Act does away with virtually all restrictions on abortion and allows abortion throughout pregnancy. The RHA allows health care workers who are not licensed physicians to perform abortions. The RHA disproportionately affects Black women. In New York City, for example, white women obtained 16.3% of all abortions performed in the city in 2015. The abortion rate for Hispanic women was 30.4% and the rate for Black women was 42.9%. Centers for Disease Control and Prevention, *Morbidity and Mortality Weekly Report*, (November 23, 2018) available at <https://www.cdc.gov/mmwr/volumes/67/ss/pdfs/ss6713a1-H.pdf>. Laws like the RHA that slacken safety regulations on abortion will put more Black women than white women at risk.

As noted above, Indiana recently passed legislation to prohibit abortion based on race and for good reason. *Box, supra*, at 139 S.Ct at 1786. In 2014, abortions were performed on Black women at a rate more than three times that of their state-wide demographic. See *State Facts about Abortion: Indiana*, Guttmacher Institute (May 2018) available at <https://www.guttmacher.org/fact->

sheet/state-facts-about-abortion-indiana and United States Census Bureau, *Quick Facts: Indiana*, available at <https://www.census.gov/quickfacts/in>.

Planned Parenthood has effectively carried out Margaret Sanger’s vision. The result of decades of targeting Black communities is a drastic reduction in the fertility rate in Black women. While fertility rates have decreased for all populations in the United States, “...the decline in fertility has been *far* greater among minorities than among non-Hispanic whites.” Lyman Stone, *Baby Bust: Fertility is Declining the Most Among Minority Women* (May 16, 2018), available at <https://ifstudies.org/blog/baby-bust-fertility-is-declining-the-most-among-minority-women>. The Institute for Family Studies estimated that between 4.1 and 4.6 Black children are “missing.” These are children who would have been born had the Black fertility rate remained steady from 2008 to 2016.

Clearly, as Justice Thomas points out, “support for the goal of reducing undesirable populations through selective reproduction has by no means vanished.” *Box, v. Planned Parenthood supra*, at 1786-87.

II. A BUT-FOR CAUSATION STANDARD FAILS TO ADEQUATELY REMEDY THE HARMFUL EFFECTS OF RACIAL DISCRIMINATION.

Abortion advocates may counter by claiming they are providing a service needed and desired by a population. However, the effects of the

discriminatory practices of Planned Parenthood and other abortion clinics have life-altering impacts, affecting not only the women and unborn children they target, but also future children.

For example, a 2008 literature review surrounding pre-term birth, early pre-term birth (EPB) and extremely pre-term birth (XPB) found that Black women were at a 3 and 4 times greater risk for EPB and XPB, respectively. Brent Rooney et al., *Does Induced Abortion Account for Racial Disparity in Preterm Births, and Violate the Nuremberg Code?*, J. AM. PHYS. & SURGEONS, Winter 2008 at 102. Additionally, they found the culprit to be linked to abortion rates, as “[n]umerous studies have shown a statistically significant increase in risk of EPB or XPB in women with a history of induced abortion compared with women with no prior induced abortions. About 43% of pregnancies in Black American women end in abortion. It is likely that induced abortion is an important risk factor for preterm birth and that it helps to explain the racial disparity.” Brent Rooney et al., *Does Induced Abortion Account for Racial Disparity in Preterm Births, and Violate the Nuremberg Code?*, J. AM. PHYS. & SURGEONS, Winter 2008 at 102.

“Individuals born preterm are at an increased risk for type 2 diabetes, cardiovascular and cerebrovascular diseases, hypertension, chronic kidney disease, asthma and pulmonary function abnormalities, and neurocognitive and psychosocial disorders and poorer social adaptation.” Tonse N.K. Raju, et al., *Long-Term Healthcare Outcomes of Preterm Birth: An Executive Summary of a*

Conference Sponsored by the National Institutes of Health, *The Journal of Pediatrics* (February 2017), available at [https://www.jpeds.com/article/S0022-3476\(16\)31083-6/fulltext](https://www.jpeds.com/article/S0022-3476(16)31083-6/fulltext).

Though falling short of a true confession, even America's leading abortion provider, Planned Parenthood, admits there's a hidden story when it comes to live births to Black women.

“Aside from underlying health conditions experts also point to an array of social factors, including vast inequities, [to explain birth disparities]. But even after accounting for socioeconomic factors, educated, middle-class Black women were found to be at even higher risk of having smaller, premature babies with a lower chance of survival.... And unconscious bias may also play an important role.”

Vernita, *Birth Outcome Disparities Among Black Women*, March 2, 2018, available at <https://www.plannedparenthood.org/planned-parenthood-pacific-southwest/blog/birth-outcome-disparities-among-Black-women>.

When a plaintiff is able to establish that a defendant's actions stem from not just unconscious bias, but are based at least in part on discriminatory intent as a motivating factor, this fulfills the purpose of section 1981. *Nat'l Ass'n of African Am.-Owned Media v. Charter Communications, Inc.*, 915 F.3d 617, 624 (9th Cir. 2019). This should be taken seriously by our lawmakers and courts, as is encouraged by the authors of an Institute of Medicine study who recommend better funding for (and subsequent

enforcement of) civil rights laws as a method to eliminate “racial and ethnic disparities in healthcare.” Brian D. Smedley, et. al., *Unequal Treatment: Confronting Racial And Ethnic Disparities In Health Care*, National Academies Press, at pp. 13, 15 (2003), available at <https://www.nap.edu/read/10260/chapter/1>.

Moreover, a comprehensive study of race and health care was published in 2002, concluding that racial bias and prejudice is a factor in differing qualities of health care received. And this was not a matter of simply leveling out the opportunities given to racial minorities compared to the white population. “Racial and ethnic minorities tend to receive a lower quality of healthcare than non-minorities, even when access-related factors, such as patients’ insurance status and income, are controlled.” Brian D. Smedley, et. al., *Unequal Treatment: Confronting Racial And Ethnic Disparities In Health Care*, National Academies Press, at p. 1 (2003), available at <https://www.nap.edu/read/10260/chapter/1>. This difference in quality, the study shows, are “remarkably consistent” throughout health care. *Id.* At 5.

“While there is no direct evidence that provider biases affect the quality of care for minority patients, research suggests that healthcare providers’ diagnostic and treatment decisions, as well as their feelings about patients, are influenced by patients’ race or ethnicity.” Brian D. Smedley, et. al., *Unequal Treatment: Confronting Racial And Ethnic Disparities In Health Care*, National Academies Press, at p. 10-11

(2003), available at <https://www.nap.edu/read/10260/chapter/>.

Black women and their children experience actual damages in medical bills, mental anguish, lost wages due to a mixed-motive discriminatory health system.

The Ninth Circuit Court of Appeals found that the language of Section 1981 sets a high bar in favor of equality, holding that “[i]f discriminatory intent plays any role in a defendant's decision not to contract with a plaintiff, even if it is merely one factor and not the sole cause of the decision, then that plaintiff has not enjoyed the same right as a white citizen.” *Nat'l Ass'n of African Am.-Owned Media v. Charter Communications, Inc.*, 915 F.3d 617 (9th Cir. 2019).

From the South's “peculiar institution” to the present day abortion industry, racism in America has been couched in paternalistic terms. Just as many slave holders justified their ownership of human beings by convincing themselves that Black people could not care for themselves or their families, Margaret Sanger and her eugenist allies espoused the notion that the State had to interfere in order to protect Black Americans from “careless and reckless breeding.” Margaret Sanger, *Birth Control and Society*, (April - June 1916), available at <https://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=101859.xml>.

Are we willing today to exonerate slave holders simply because discriminatory intent was “only” a motivating factor, rather than the “but-for” cause?

Are we willing to exonerate the abortion industry for its role in the eventual elimination of the American Blacks through decreased birth rates that fall below the replacement levels?

For the doubter, consider the rhetoric of abortion marketing. When then-candidate Bill Clinton coined the term “safe, legal, and rare,”² he acknowledged that there was something amiss at the thought of ending a life before birth. This was reminiscent of slavery rhetoric, essentially claiming that abortion was a “necessary evil.” After all, when an act is not evil, there is no need for the government to attempt to keep it rare.

But today’s abortion industry touts a different line. Now, abortion supporters encourage women and men to stand up and be proud of the choice they make to end an existing life. Slogans like “Abortion on demand without apology” and campaigns such as “Shout Your Abortion” normalize and encourage abortion, turning it into a “positive good.”³

But this is an overarching message about abortion, not simply one sent to the Black community. The eugenics of Margaret Sanger were not only race-based, but also based on mental

² Lainey Newman, *Safe, Legal, and Rare: The Democrats’ Evolving Stance on Abortion*, Harvard Political Review (January 11, 2018), available at <https://harvardpolitics.com/united-states/safe-legal-and-rare-the-democrats-evolving-stance-on-abortion/>

³ Caroline May, *Pro-choicers demonstrate: ‘Abortion on demand and without apology!’*, Daily Caller (January 24, 2012), available at <https://dailycaller.com/2012/01/24/pro-choicers-demonstrate-abortion-on-demand-and-without-apology/>; <https://shoutyourabortion.com/>

capacity and financial status. This is the conundrum and complexity of hidden hate. It is not a clean cut between whether someone hates the poor, or the mentally compromised, or the minority races. Rather, as Justice Thomas points out, eugenicists don't use only race as a reason for eugenics. *Box, supra*, at 1786.

Should there be any doubt that racism plays into abortion's particular variety of paternalism, Planned Parenthood itself admits it does. "The patriarchal racism of the social policy of the time and the well-intentioned paternalism of philanthropists to "lift up" African Americans, may have influenced Sanger."⁴

Still, on the 100-year anniversary of Margaret Sanger's founding of Planned Parenthood, the nation's largest abortion provider called Sanger a "visionary" and "a woman of heroic accomplishments," brushing aside her eugenic and racial motivations as "layered and complex." Planned Parenthood Federation of America, *Margaret Sanger—Our Founder Fact Sheet*, (October 2016), available at https://www.plannedparenthood.org/files/9214/7612/8734/Sanger_Fact_Sheet_Oct_2016.pdf.

Even today Planned Parenthood messaging targets Black women more so than others by fear-mongering with tweets such as this:

⁴ Planned Parenthood Federation of America, *Margaret Sanger – Our Founder Fact Sheet*, (October 2016), available at https://www.plannedparenthood.org/files/8013/9611/6937/Opposition_Claims_About_Margaret_Sanger.pdf - pg. 2

“If you’re a Black woman in America, it’s statistically safer to have an abortion than to carry a pregnancy to term or give birth.”

@PPBlackComm, Twitter, Oct. 31, 2017, 8:13 AM, available at <https://twitter.com/ppblackcomm/status/925380307242582016?lang=en>.

While some might see this as concern for the health of Black women, when viewed in light of Planned Parenthood’s eugenic history and continued targeting of Black Americans for population reduction through strategically-placed birth control and abortion clinics, it becomes clear that such messages are, at the very least, motivated by discriminatory intent.

CONCLUSION

The discriminatory intent espoused by Margaret Sanger and practiced by the organization she founded have resulted in the decimation of the Black population in this nation. Does Planned Parenthood set out to suppress our population growth and eliminate future generations of Black Americans *only* because they are Black? What we do know and what we have demonstrated that race was—and is—a significant motivating factor in their discriminatory acts.

We recognize that the case at bar does not directly address eugenics and abortion. But if Black Americans are not even free to be born, it is difficult to imagine we will achieve “the full and equal benefit of all laws and proceedings for the security of persons and property” promised in 42

U.S.C. § 1981.

This case turns on the standard by which to prove the injustice of racial discrimination. For the reasons stated above, *amicus* believes that standard should be a motivational factor and that the Court should deny Comcast's petition.

Respectfully submitted,

CATHERINE W. SHORT

Counsel of Record

ALEXANDRA SNYDER

ALLISON K. ARANDA

Life Legal Defense Foundation

PO Box 2105

Napa, CA 92544

Tel.: (805) 640-1940

Fax: (707-224-6676

LLDFOjai@cs.com

Counsel for Amicus Curiae

September 17, 2019