

Nos. 23-235, 23-236

In the Supreme Court of the United States

U.S. FOOD AND DRUG ADMINISTRATION, ET AL.,
Petitioners,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,
Respondents.

and

DANCO LABORATORIES, LLC, ET AL.,
Petitioners,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,
Respondents.

*On Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit*

**BRIEF OF AMICI CURIAE
NATIONAL HISPANIC LEADERSHIP CONFERENCE AND
FREDERICK DOUGLASS FOUNDATION
SUPPORTING RESPONDENTS**

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INTEREST OF AMICI CURIAE¹

Amici are the National Hispanic Christian Leadership Conference and the Frederick Douglass Foundation. Amici are diverse, nonprofit faith organizations that represent or minister to significant portions of the Hispanic and African American communities. They speak on behalf of more than 70,000 Hispanic and African American churches and tens of millions of African Americans and Hispanics across the United States. Amici have a strong interest in exposing the racist and eugenic history of the abortion movement, which has had catastrophic consequences on communities of color.

This Court has previously recognized Amici's perspective on the racist roots of the modern abortion movement. See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 255 n.41 (2022) (citing Brief for African American Organization et al. as *Amici Curiae*). In furtherance of their commitment to exposing dark history of abortion in America, and to protect vulnerable communities from genocidal social policies, Amici have a strong interest in challenging the FDA's chemical abortion regimen and approval of mifepristone. In light of Amici's background and experience in this sensitive area, their perspective is unlikely to be represented by the litigants or other parties.

¹ Counsel for Amici certify that no party authored this brief in whole or in part, and no such counsel or party contributed money to prepare or submit this brief.

SUMMARY OF ARGUMENT

This Court should uphold the Fifth Circuit’s decision affirming the portions of the stay order regarding the Food and Drug Administration’s (FDA) loosening of prior protections against mifepristone’s serious side effects and its decision to allow the drug to be dispensed by mail. As the court of appeals observed, by relaxing mifepristone’s safety restrictions, the FDA “failed to address several important concerns about whether the drug would be safe for the women who use it,” and “it failed to gather evidence that affirmatively showed that mifepristone could be used safely without being prescribed and dispensed in person.” *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210, 256 (5th Cir. 2023).

Amici submit this brief to highlight that this case is not merely about standing. Nor is it just about whether the FDA’s actions violated the Administrative Procedure Act (APA) or another federal law. This case also raises the question of *why* a dangerous abortifacient is owned by the Population Council, an organization founded by eugenicists with a nefarious history of promoting population control. As we discuss below, the answer is clear: The Population Council’s advocacy for the easy availability of mifepristone—despite the drug’s serious health risks—derives from the same eugenic ideology that motivated the Council’s founding. And it is the same ideology that induced this Court’s notorious decision in *Buck v. Bell*, 274 U.S. 200 (1927). See Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* 13 (2016) (calling *Buck* a “dark legal landmark”).

Beyond the issues of standing and administrative procedure, staying the approval of the mail-order abortifacient protects the public interest by preventing the drug from being used to target minority and disabled communities for eugenic ends. As Amici have argued to this Court before, abortion is largely a minority epidemic—and purposefully so. Advocates for mifepristone, including the Population Council and Planned Parenthood, have carried on Margaret Sanger’s legacy of eliminating or preventing unborn children based on race, sex, and disability. Put simply, mifepristone has become “a tool of modern-day eugenics.” *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1783 (2019) (Thomas, J., concurring). And “reproductive freedom” and “population control” are coded signals to advance the eugenic aim of reducing “undesirable” populations. At a minimum, the Court should not allow the FDA to circumvent safety laws to allow a eugenic drug to destroy more innocent lives. For these reasons, the Court should affirm the Fifth Circuit’s decision.

ARGUMENT

I. The Abortion and Birth Control Movements Are Rooted in Social Darwinism and the Elimination of “Undesirable” People.

To understand how mifepristone has been deployed as a eugenic drug, it is necessary to recount the history of the American abortion and birth control movements as a front for the eugenics agenda. When the veil is drawn aside, the framing of abortion as a fundamental reproductive right is exposed

as a guise for the eugenics movement's ultimate goal of removing "undesirable" people. Indeed, presenting abortion as a matter of "my body, my choice" simply conceals the underlying motive of widespread abortion: shaping the composition of society through the selective elimination of preborn persons. As seen by the Population Council's history and research interests, by emphasizing "reproductive freedom," the eugenics agenda is advanced under the guise of promoting women's autonomy without overtly acknowledging the abortion movement's historical connection to population control. Granted, not all abortion advocates share these motives, but the history of the abortion and birth control movements raises legitimate concerns about their undeniable links to the eugenics movement.

A. The Origin of the Eugenics Movement.

Modern abortion advocacy arose out of the birth control movement, which was "developed alongside the American eugenics movement." *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring). Coined in the 1880s by Francis Galton, a British scientist and 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. Put simply, the goal of the eugenics movement was to eliminate "unfit" and "undesirable" people—those with mental and physical disabilities as well as certain races.

By the 1920s, the eugenics movement was *en vogue* among progressives, academics, and the medical

community. See Adam Cohen, *Imbeciles: The Supreme Court, American Eugenics, and the Sterilization of Carrie Buck* 2 (2016). “Many leading figures of the day—Theodore Roosevelt, John D. Rockefeller, Mrs. Mary Harriman, David Starr Jordan (a biologist and the first president of Stanford University), to name some—were fervent eugenicists, putting their money, their power, their time, and their research behind the effort.” Jeffrey Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 87 (2018). As we discuss below, John Rockefeller III founded the Population Council, the patent holder to mifepristone.

Margaret Sanger, Planned Parenthood’s founder, 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.” Margaret Sanger, *The Eugenic Value of Birth Control Propaganda*, BIRTH CONTROL REV., Oct. 1921, at 5. She accordingly praised sterilization as the “remedy” to the problem of “an increasing rate of morons.” Margaret Sanger, *The Function of Sterilization*, BIRTH CONTROL REV., Oct. 1926, at 299.

In the first two decades of the twentieth century, the eugenic movement altered the legal landscape. Between 1907 and 1922, a dozen states passed eugenic sterilization laws. 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). And one court 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, feebleminded, and insane, our race is facing the greatest peril of all time.” *Smith v. Wayne*, 231 Mich. 409, 425 (1925).

In *Buck v. Bell*, 274 U.S. 200 (1927), this Court “threw its prestige behind the eugenics movement.” *Box*, 139 S. Ct. at 1786 (Thomas, J., concurring). There 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 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. According to this Court:

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.

Ibid. (citation omitted) (emphasis added).

The *Buck* decision had a profound impact on the eugenics movement. See Sutton, *51 Imperfect Solutions*, at 117 (“As an advertisement for eugenics, *Buck v. Bell* worked.”). Within five years, 28 states had adopted compulsory sterilization laws; and between 1907 and 1983, more than 60,000 people were

involuntarily sterilized. See Cohen, *supra*, at 299–300, 319; see generally Peter Quinn, *Race Cleansing In America*, 54 AMERICAN HERITAGE 2–3 (2003). Never overruled, the *Buck* decision is also a dark stain on this Court, which has resulted in the forced sterilization of helpless human beings made in the image and likeness of God. See Cohen, at 13 (observing that *Buck* “delivered a clarion call to Americans to identify those among them who should not be allowed to reproduce—and to sterilize them in large numbers”).²

B. The Eugenic Era Lives on Through the Abortion Movement.

The eugenics movement fell out of fashion after World War II with the fall of Nazi Germany, see Sutton, at 87, but “[t]ragically, * * * the 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

² 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.”).

(“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.” Margaret Sanger, *Pivot of Civilization* 189 (1922). 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.” Margaret Sanger, *Birth Control and Racial Betterment*, BIRTH CONTROL REV., Feb. 1919, at 11.

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 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.” Emily Bazelon, *The Place of Women on the Court*, N.Y. Times Magazine (July 7, 2009).³

C. The Eugenics Movement’s Racist Roots.

Many eugenicists drew “the distinction between the fit and the unfit * * * along racial lines.” *Box*, 139 S. Ct. at 1785 (Thomas, J., concurring) (citing examples). See Lombardo, *supra*, 2 ST. LOUIS U. J.

³ Available at <https://www.nytimes.com/2009/07/12/magazine/12ginsburg-t.html> (last visited Feb. 22, 2024).

HEALTH L. & POL'Y at 76 (noting that Margaret Sanger was open about “voicing her contempt for the poor, disabled and minorities). The Immigration Act of 1924 “represented a eugenic (and racist and nativist) attempt to protect the integrity of Anglo-American stock.” Corinna Lain, *Three Supreme Court “Failures” and a Story of Supreme Court Success*, 69 VANDERBILT L. REV. 1040 (2019); see also Cohen, *supra*, at 132–35 (discussing role of eugenicists in passing the act). 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. See Dorothy Roberts, *Killing The Black Body: Race, Reproduction, and The Meaning Of Liberty* 88–89 (1997). In the 1930s and 1940s, the North Carolina Eugenics Commission sterilized nearly 8,000 “mentally deficient persons,” some 5,000 of whom were Black. *Id.* (footnote omitted); see also Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of Madrigal v. Quilligan*, in REPROD. RIGHTS & JUSTICE STORIES 97, 99 (Melissa Murray et al. eds., 2019) (describing the forced sterilization of Mexican-American women in California into the 1970s).

The links between abortion and racist eugenics are manifold. To begin with, Margaret Sanger focused her eugenic goal to eliminate “the unfit” on minorities. In promoting birth control, Sanger advanced a “Negro Project,” Margaret Sanger Papers Project, Newsletter #28, *Birth Control or Race Control? Sanger and the Negro Project* (2001) (Sanger

Newsletter).⁴ She gave a speech to the Ku Klux Klan. See Margaret Sanger, *An Autobiography* 366 (1938). And she 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.” Opinion, Margaret Sanger, *Apostle of Birth Control Sees Cause Gaining Here*, N.Y. Times, Apr. 8, 1923, at 11.

Moreover, Sanger personally set up birth-control clinics in minority communities, including a clinic in Harlem in 1930. See Sanger Newsletter; 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 that in its early advocacy for birth control, Planned Parenthood “focused on unwanted children and pathological parenting in poor African American communities”). 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.

Sanger Newsletter (citation omitted).

⁴ Available at http://www.nyu.edu/projects/sanger/articles/bc_or_race_control (last visited Feb. 22, 2024).

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 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.” Donald Critchlow, *Intended Consequences: Birth Control, Abortion, and the Federal Government in Modern America* 61 (1999) (quoting a 1966 communication between a Planned Parenthood field consultant to Alan Guttmacher).⁵ 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.” Critchlow, *Intended Consequences*, at 142.⁶

Beyond anecdotes, the actual data confirms that abortion has devastated communities of color. According to one peer-reviewed study, “black women have been experiencing abortions at a rate nearly

⁵ See also *Box*, 139 S. Ct. at 1790 (Thomas, J., concurring) (noting that some Black groups considered “‘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” (citation and internal quotation marks omitted)).

⁶ Accord David Beito & Linda Royster Beito, *Black Maverick: T.R.M. Howard’s Fight For Civil Rights and Economic Power* 215 (2009) (noting that some African American civil rights leaders “fretted about the racist implications of abortion”).

four times that of white women for more than 30 years.” James Studnicki et al., *Perceiving and Addressing the Pervasive Racial Disparity in Abortion*, Health Servs. Research & Managerial Epidemiology (2020).⁷ Dr. James Sherley, one of the study’s authors, commented: “Abortion is the hushed killer of Black life that has silenced millions of George Floyds before they even took their first breath of air. Yet, in this remarkable moment of social reform history, the lives of Black preborn children have been forgotten.” Opinion, James Sherley, *Preborn Black Lives Matter, Too*, Wash. Times (Aug. 2, 2020).⁸

According to the Centers for Disease Control’s most recent data, African American women accounted for 33.6% of all reported abortions in 2018, even though they comprise 13% of women in the United States. Katherine Kortsmit et al., Ctrs. for Disease Control & Prevention, *Abortion Surveillance—United States, 2018* (Nov. 27, 2020); U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Race, and Hispanic Origin* (2020). Black 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 African American community are 69 times higher than HIV deaths, 31 times higher than (all other) homicides, 3.6 times higher than cancer-

⁷ Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7436774/pdf/10.1177_2333392820949743.pdf (last visited Feb. 22, 2024).

⁸ Available at <https://www.washington-times.com/news/2020/aug/2/preborn-black-lives-matter-too/> (last visited Feb. 22, 2024).

related deaths, and 3.5 times higher than deaths caused by heart disease. Ctrs. For Disease Control & Prevention, Morbidity & Mortality Wkly. Rep., *Abortion Surveillance—United States, 2018*, at 8.

In Mississippi, 3,005 abortions were reported in 2018. Of those abortions, 72% were performed on African American women, compared to just 24% on white women and 4% on women of other races. See Tessa Longbons, Charlotte Lozier Inst., *Abortion Reporting: Mississippi (2018)* (May 8, 2020).⁹ Indeed, the Charlotte Lozier Institute estimates that the African American 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. *Ibid.*

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 clinics are within walking distance of predominantly African American or Hispanic neighborhoods. Susan Enouen, Life Issues Inst., *New Research Shows Planned Parenthood Targets Minority Neighborhoods*, Life Issues Connector (Oct. 2012);¹⁰ see also Mark Crutcher et al., Life Dynamics, Inc., *Racial Targeting and Population Control* 22 (2011) (reporting that in every state, “population control centers” are in “zip codes with higher percentages of

⁹ Available at <https://lozierinstitute.org/abortion-reporting-mississippi-2018/> (last visited Feb. 22, 2024).

¹⁰ Available at <http://www.protectingblacklife.org/pdf/PP-Targets-10-2012.pdf> (last visited Feb. 22, 2024).

blacks and/or Hispanics than the state’s overall percentage”).¹¹

More specifically, Planned Parenthood intentionally located 86% of its abortion facilities in or near minority neighborhoods in the 25 U.S. counties with the most abortions. See Susan Enouen, *Research Shows Planned Parenthood Expands Targeting Minorities as it Spurns Racist Founder*, Townhall (Sep. 23, 2020).¹² These 25 counties contain 19 percent of the U.S. population, including 28% of the African American population and 37% of the Hispanic/Latino population. In 12 of these counties, Blacks and Hispanics/Latinos are more than 50% of the population. In comparison, African Americans are only 12.6% of the U.S. population, and Hispanics and Latinos are 16.3%. 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 located abortion clinics near minority neighborhoods, the abortion industry’s attempt to deny its eugenic aims cannot withstand objective scrutiny. See Crutcher, *supra*, at 4 (noting that “these patterns are routinely considered indicative of racial targeting when it comes to other issues,” such as when civil rights advocates criticize tobacco and alcohol

¹¹ Available at https://issues4life.org/pdfs/racial_targeting_population_control.pdf (last visited Feb. 22, 2024).

¹² Available at <https://townhall.com/columnists/susanwillkeenouen/2020/09/23/research-shows-planned-parenthood-expands-targeting-minorities-as-it-spurns-racist-founder-n2576680> (last visited Feb. 22, 2024).

companies for concentrating their retail and marketing efforts disproportionately in minority neighborhoods).

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, and other minorities. Sanger clearly believed that these “undesirable” people should not reproduce and thus advocated for their sterilization. See generally Margaret Sanger, *My Way to Peace*, Address to the New History Society (Jan. 17, 1932). Moreover, Sanger’s life purpose was to implement eugenic population control, and targeted birth control was her way to achieve it. And as discussed below, pro-eugenic organizations like the Population Council, the patent holder of mifepristone, continue Sanger’s shameful legacy to this day.

D. Modern Abortion Policy Promotes the Eradication of Preborn Children with Down Syndrome and Other Disabilities.

Next month, millions across the globe will celebrate 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.” See G.A. RES. 66/149, ¶ 3 (Dec. 19, 2011). 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. See Decl. of

Jason Lindo ¶ 30 (Lindo Decl.), D. Ct. Doc. 28-2, at 11.

Selective abortion is morally and ethically wrong. Aborting children based on prenatal diagnosis of Down syndrome is undeniably 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.¹³ Accordingly, the District Court had a strong public policy interest in issuing 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 a disturbingly effective strategy to carry out discriminatory eugenics. 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.” *Box*, 139 S. Ct. at 1784 (Thomas, J., concurring)

¹³ 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”).

(citing examples).¹⁴ 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 genetic testing that their child has Down syndrome opt to abort the baby. See Caroline Mansfield et al., *European Concerted Action, Termination Rates After Prenatal Diagnosis of Down Syndrome, Spina Bifida, Anencephaly, and Turner and Klinefelter Syndromes: A Systematic Literature Review*, 19 *PRENATAL DIAGNOSIS* 808, 810 (1999). 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. 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).¹⁵ 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.” Dave Maclean, *Iceland Close to*

¹⁴ 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.” American College of Obstetricians & Gynecologists, *Practice Bulletin 162: Prenatal Diagnostic Testing for Genetic Disorders* (May 2016).

¹⁵ Available at <https://www.cbsnews.com/news/down-syndrome-iceland/> (last visited Feb. 22, 2024).

Becoming First Country Where No Down's Syndrome Children Are Born, Independent (Aug. 16, 2017).¹⁶

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 baby. Susan Donaldson James, *Down Syndrome Births are Down in the U.S.*, ABC News (Oct. 30, 2009).¹⁷ Furthermore, a review of nine hospital-based studies shows that over 85% of babies are aborted following a prenatal diagnosis of Down syndrome. 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). 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 weeks or less into their pregnancy aborted their babies compared to 85% at 17 weeks or greater. Maclean, *supra*, at 149.

Even more alarming, an anonymous survey of nearly 500 physicians who had delivered prenatal diagnoses revealed that 13% of the providers

¹⁶ Available at <https://www.independent.co.uk/life-style/health-and-families/iceland-downs-syndrome-no-children-born-first-countryworld-screening-a7895996.html> (last visited Feb. 22, 2024).

¹⁷ Available at https://abcnews.go.com/Health/w_ParentingResource/down-syndrome-births-dropus-women-abortion/story?id=8960803 (last visited Feb. 22, 2024).

emphasized the negative aspects of Down syndrome so that patients would favor terminating the pregnancy, and 10% actively “urge” parents to terminate the pregnancy. 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).

In short, the eugenic use of abortion in America is not an overblown conspiracy theory promoted by pro-life activists—it is actually happening. Affirming the stay order thus “prevent[s] abortion from becoming a tool of modern-day eugenics.” *Box*, 139 S. Ct. at 1783 (Thomas, J., concurring).

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.” Brian G. Skotko et al., *Self-Perceptions from People with Down Syndrome*, AM. J. MED. GENETICS 2360, 2360, 2364 (Oct. 2011). 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.” Press Release, Children’s Hospital Boston, *Parents Siblings and People With Down Syndrome Report Positive Experiences* (Sept. 23, 2011). 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 a better person because of their sibling. See *id.*

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 straight across Lake Tahoe in 59-degree water to raise money for the National Down Syndrome Congress. See Karen Gaffney Foundation, *Karen's Story* (last accessed Feb. 19, 2024).¹⁸ On top of that, Gaffney leads a non-profit foundation dedicated to advocating for those with Down syndrome. Her message is simple: "Down Syndrome Is a Life Meant to Be Saved!" *Id.*

Other children with Down syndrome have gone on to perform at Carnegie Hall, launch a fashion label, and open their own restaurant. Zoe Ettinger, *13 People with Down Syndrome Who Are Breaking Barriers in Entertainment, Athletics, Fashion, and More*, *Insider* (Mar. 10, 2020).¹⁹ 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 means by which most children are aborted early in pregnancy, Petitioners are in effect seeking to eradicate people who have the potential to enrich our communities and foster compassion for vulnerable communities.

¹⁸ Available at <https://karengaffneyfoundation.org/karens-story> (last visited Feb. 22, 2024).

¹⁹ Available at <https://www.insider.com/people-with-down-syndrome-breaking-barriers> (last visited Feb. 22, 2024).

In sum, the decisions below offset the nefarious eugenicist agenda that targets children with Down syndrome by limiting the ways such children can be aborted. At a minimum, this order aligns with federal policy 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, Petitioners’ 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.

II. The Population Council, the Patent Holder for Mifepristone, has Longstanding Ties to Eugenics.

Imagine, if you will, an organization that was founded by an elite cabal of eugenicists to reduce the global population. As part of its plot, this organization acquired the patent for a cheap and effective drug that can easily abort millions of unborn lives. Now “medication abortions” account for the majority of all abortions in the United States. Such a story seems lifted straight out of a pulp apocalyptic thriller, but sadly it is true: The holder of the patent to mifepristone, the Population Council, has deep ties to the eugenics movement.

An overview of the Population Council’s history sheds light on how the eugenic crusade to eradicate undesirable populations through abortion and birth control continues through this century—under the guise of “reproductive health” and “family planning.”

Cf. Mary Ziegler, *Reinventing Eugenics: Reproductive Choice and Law Reform After World War II*, 14 *CARDOZO J.L. & GENDER* 319, 331 (2008) (noting how the Population Council’s “evolution offers a powerful example of how pro-eugenic groups redefined themselves and their programs in order to ensure their political survival”).

A. The Origin of the Population Council.

The Population Council “was formed partly by leaders of the eugenic legal reform movement who intended to create a new kind of organization in response to post-war politics: an organization that would prevent overall population growth and preserve the ‘quality’ of the population.” Ziegler, 14 *CARDOZO J.L. & GENDER* at 331 (quoting John D. Rockefeller III, *On the Origins of the Population Council*, 3 *POPULATION & DEV. REV.* 493, 493 (1977)).

The Council’s inception can be traced back to “a conference on population problems” convened by John D. Rockefeller III in June 1952 in Williamsburg, Virginia. Rockefeller, 3 *POPULATION & DEV. R.* at 494–96. Over the course of three days, thirty individuals—including population activists, the director of Planned Parenthood Federation of America, and various prominent figures associated with eugenics—discussed the need to promote the reduction of the global population. See Matthew Connelly, *Fatal Misconception: The Struggle to Control World Population* 156 (2008). The conference participants universally expressed concern about “the prospect of rapid population growth” and the need for “optimum population.” Rockefeller, 3 *POPULATION & DEV. R.* at 494, 496. Some speakers advocated as “necessary”

the reduction of the “rate of population growth.” *Id.* at 494. Others noted with approval the “rapid drop in fertility resulting from the urbanization of the American negro population.” *Id.* at 495. Also discussed was the “problem of ‘quality’”: that “[m]odern civilization had reduced the operation of natural selection by saving more ‘weak’ lives and enabling them to reproduce.” *Id.* at 496.

The consensus from the conference was that priority should be given “to the reduction of fertility.” Rockefeller, 3 POPULATION & DEV. R. at 496. “Many types of action were suggested which might aid in the reduction of fertility,” including “birth control” and “*more convenient methods.*” *Ibid.* (emphasis added). To further the aims of the conference, Rockefeller officially established the Population Council by providing a personal grant of \$100,000—nearly \$1.2 million in today’s dollars—and assuming the role of its inaugural president. See Connelly, *Fatal Misconception* at 155–159.

B. The Population Council’s Eugenic Roots.

A “significant number” of the Population Council’s founding members “maintained their ties with the eugenic movement.” Ziegler, 14 CARDOZO J.L. & GENDER at 331. “Not surprisingly, these members continued to endorse eugenic goals, but they now characterized those goals as matters of population control.” *Id.* For example, Rockefeller’s successor as president was Frederick Osborn, secretary of the American Eugenics Society and signatory to Sanger’s “Citizens Committee for Planned Parenthood.” Carole Novielli, *The Population Council, Which Brought the Abortion Pill to the U.S., Has*

a Shocking History That's Nothing to Celebrate, LiveAction (Nov. 14, 2017).²⁰ Under Osborn's leadership, the Population Council made regular grants to the American Eugenics Society. See Connelly, *Fatal Misconception* at 160.

Like many eugenicists of his era, "Osborn did not hesitate to endorse compulsory eugenic sterilization of the mentally ill or restrictions on immigration, and to voice caution against miscegenation." Paul A. Lombardo, "*The American Breed*": *Nazi Eugenics and the Origins of the Pioneer Fund*, 65 ALB. L. REV. 743, 801 (2002). Osborn had previously written that "[i]t is evident that the social conditions which affect reproduction might be modified in a number of ways, so that the dynamic influences of population change would be more in line with conscious social objectives." Frank Lorimer & Frederick Osborn, *Dynamics of Population: Social and Biological Significance of Changing Birth Rates in the United States* 345–348 (1934). Osborn continued: "Eventually, if our dream of human progress is to be realized, rational social action must replace the operation of blind forces in this as in other fields." *Ibid.* This passage underscores Osborn's belief that reproduction can be intentionally altered to further social engineering. He suggests that by modifying these conditions, which invariably include perceptions about birth control, the dynamic influences on population change can be directed towards planned

²⁰ Available at <https://www.liveaction.org/news/population-council-founded-eugenicists-promoting-abortion-turns-65/> (last visited Feb. 22, 2024).

demographic outcomes—the fundamental goal of eugenics.

Following Osborn's presidency at the Population Council was another leader from the American Eugenics Society, Frank Notestein. Along with Osborn, Notestein was a pioneer in the study of "differential fertility," the belief that unfit, poor, and unintelligent people were more fertile than fit people. See, e.g., Frederick Osborn, *Characteristics and Differential Fertility of American Population Groups*, 12 SOC. FORCES 1, 4 (1933). In the late 1950s, Notestein, Osborn, and other Council members revived the theory of differential fertility to promote the Council's eugenic goals. They argued that if everyone agreed on the need for population control, then the focus should be on limiting the growth of highly fertile individuals—that is, the unfit or undesirable. According to Osborn, these people were "the socially inadequate—those families who are perennially on relief rolls, the constant problem of the social worker." Frederick Osborn, *Qualitative Aspects of Population Control: Eugenics and Euthenics*, 25 L. & CONTEMP. PROBS. 406, 423 (1960). In other words, the Population Council's resident eugenicists believed that "if an overall reduction in world and domestic population growth inevitably improved the quality of population, those interested in eugenics could achieve the same goals by studying and campaigning for less controversial population control reforms." Ziegler, 14 CARDOZO J.L. & GENDER at 335.

Unsurprisingly, as the Population Council sought to reduce reproduction rates among "high fertility groups," its "research interests and policy proposals displayed a more overt racial bias." Ziegler, 14

CARDOZO J.L. & GENDER at 335. For instance, during the early 1960s, the Council began supporting research aimed at lowering growth rates in both urban and rural African American communities. See *id.* As Professor Ziegler observed, the shift in research focus reflected two emerging perspectives within the Council: “First, the new research suggested that it would be desirable to reduce the size of the African-American population.” *Id.* “Second, the research focus demonstrated that a growing number of Council members believed that the ‘socially inadequate’ were rarely white.” *Ibid.*

The Population Council’s eugenic aim to reduce the population of minorities is further evident in the Council’s close sponsorship of the work of Donald Bogue, a demographer and member of the University of Chicago’s Population Research and Training Center. See Research Proposal, “Problems of Bearing and Rearing Children in High-Fertility, Low-Income, Low Education American Families,” (1960) (Research Proposal) in The Rockefeller Archive, Rockefeller University, Population Council Papers, Box 46, Folder 653. Bogue argued that minorities “continued to make wrong choices with respect to family planning because they were incompetent, unmotivated, or influenced by their own or their family’s culture.” Ziegler, 14 CARDOZO J.L. & GENDER at 336–37. That being so, Bogue called for “a program that used all measures short of force in order to assure that members of high fertility groups made the right choices.” *Id.* After 1960, Bogue received most of his funding from the Population Council, see Research Proposal, and by the mid-1960s, the Council’s Executive Board followed his recommendations in

prioritizing funding contraceptive programs in minority communities, see Minutes of a Meeting of the Rockefeller Council Executive Board (May 9, 1966) in The Rockefeller Archive, Rockefeller University, Population Council Papers, Box 56, Folder 903.

In 1969, Bernard Berelson, the Population Council's fourth president, wrote an article called "Beyond Family Planning" in the Council's *Studies in Family Planning* journal. Berelson sought to review various proposals that address the "problem" of population growth, and he discussed "programs or policies more or less responsibly suggested," such as adding "fertility control agents" to urban water supplies, temporary sterilization of young women using "time-capsule contraceptives," and mandatory sterilization for men with three or more children. Bernard Berelson, *Beyond Family Planning*, 38 *STUD. FAM. PLAN.* 1–3 (Feb. 1969). Chillingly, Berelson observed that it is "worth noting" that "more extreme or controversial proposals tend to legitimate more moderate advances, by *shifting the boundaries of discourse.*" *Id.* at 12 (emphasis added). As we have seen since its founding, the Population Council has "shift[ed] the boundaries of discourse," *id.*, from the openly eugenic aims of its founding members such as Frederick Osborn and Frank Notestein to other guises, such as "population control" and "reproductive choice."

C. The Population Council's Acquisition of Mifepristone.

After decades of funding population control studies and programs, the Population Council finally found a most effective avenue to achieve its eugenic aims:

the RU-486 chemical abortifacient pill, commonly known as mifepristone. The abortifacient was developed by the French company Roussel-Uclaf, which sought to sell the rights to an American firm. Fearing a political backlash and because of safety concerns, no American company was willing to buy the pill. So in May 1994, Roussel-Uclaf donated the patent rights to RU-486 to the Population Council. See Nancy Gibbs, *The Pill Arrives*, CNN (Oct. 2, 2000);²¹ see also FDA Pet. App. 113a; C.A. App. 107. Seeing that a cheap and widespread abortifacient drug would further its mission, the Population Council conducted clinical trials, secured FDA approval in 2000, and identified a manufacturer. See *id.*

During the FDA approval process, the Population Council transferred the rights to produce and distribute RU-486 to Petitioner Danco Laboratories, a “secretive and obscure” entity formed in 1995 in the Cayman Islands, in return for undisclosed royalties. Robert O’Harrow Jr., *Drug’s U.S. Marketer Remains Elusive*, The Washington Post (Oct. 11, 2000).²² FDA Pet. App. 6a; C.A. App. 115. Danco then contracted with the Chinese firm Hua Lian Pharmaceutical Co. to manufacture the compounds for RU-486. This arrangement was reportedly facilitated by the

²¹ Available at <https://www.cnn.com/ALLPOLITICS/time/2000/10/09/pill.html> (last visited Feb. 22, 2024).

²² Available at <https://www.washingtonpost.com/archive/politics/2000/10/12/drugs-us-marketer-remains-elusive/8b7b732b-0f23-4c96-9051-714cd3d9f6f8/> (last visited Feb. 22, 2024).

Rockefeller Foundation. *Abortion Pill Maker Revealed*, CBS News (Oct. 13, 2000).²³

In the final analysis, the Population Council has a long history of providing funding, research, and advocacy to legitimize and expand access to abortion as a means to reduce minority birth rates and preserve the “quality” of the population. Rockefeller, *supra*, 3 POPULATION & DEV. REV. at 493. Allowing the unlawful distribution of mifepristone by mail would enable the Population Council’s ongoing experiments on reducing birth rates and eliminating “undesirable” persons.

III. The Federal Government’s Own “Expert” in this Case Chillingly Echoes the Eugenicist Aims of Widespread Abortion.

Amici have discussed at length how the abortion industry is rooted in eugenic aims to reduce the population under the guise of “reproductive freedom.” Amici do not base their concerns on mere hypotheticals or conspiratorial theories. To find support for Amici’s claims, the Court need not look further than this litigation, to a declaration submitted by the FDA from Dr. Jason Lindo, an economics professor at Texas A&M University whose research interests include the economic effects of abortion policies. See Lindo Decl., D. Ct. Doc. 28-2, at 2.

In his declaration, Lindo makes speculative claims about the outcomes of not having chemical abortions, particularly focusing on the expected challenges for children born to those unable to obtain

²³ Available at <https://www.cbsnews.com/news/abortion-pill-maker-revealed/> (last visited Feb. 22, 2024).

abortions. He direly declares, under oath, that children who are not aborted may face difficulties in school, have “more behavioral and social issues,” lower education levels, poorer health, and “an increased likelihood of criminal involvement.” Lindo Decl. ¶ 20, D. Ct. Doc. 28-2, at 7. Lindo strongly suggests that, based on these expectations, abortion is preferable to allowing the child to live. Put simply, the FDA—a *federal agency*—submitted a supporting declaration that claims that children should be aborted because they are more likely to be *unfit* for school, for adulthood, and for society.

As discussed above, Dr. Lindo’s perspective is not new: It is rooted in the eugenics movement and consistent with contemporary scholarship. See, e.g., John J. Donohue & Steven D. Levitt, *The Impact of Legalized Abortion On Crime*, 116 Q. J. OF ECON. 379 (2001) (arguing that “legalized abortion has contributed significantly to recent crime reductions”); John J. Donohue & Steven D. Levitt, *The Impact of Legalized Abortion on Crime Over the Last Two Decades* (Nat’l Bureau of Econ. Rsch., Working Paper No. 25863, 2019) (estimating that “crime fell roughly 20% between 1997 and 2014 due to legalized abortion” and that the “cumulative impact of legalized abortion on crime is roughly 45%”).

Again, it is hard not to observe the racist undertones of such theories, given that the abortion rate is higher among black and Hispanic women. In any event, potential difficulties in a child’s future should not justify aborting that child. Yet Dr. Lindo’s declaration reflects that prevailing sentiment among so-called experts that mifepristone may be used as “a disturbingly effective tool for implementing the

discriminatory preferences that undergird eugenics.” *Box, supra*, 139 S. Ct. at 1790 (Thomas, J., concurring) (citing examples).

CONCLUSION

The Court should affirm the Fifth Circuit’s order and remand for further proceedings.

Respectfully submitted.

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