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Hearing of the House Judiciary Committee, Subcommittee on the Constitution and Civil Justice
Regarding H.R._____, the Prenatal Nondiscrimination Act (PRENDA) of 2016

April 14, 2016
3:00 p.m.
2237 Rayburn Building

Hon. Trent Franks, Chair
Hon. Steve Cohen, Ranking Member
Honorable Members
United States House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution and Civil Justice
2237 Rayburn House Office Building
Washington, DC 20515-6216

Mr. Chairman Franks, Ranking Member Cohen, and Distinguished Members of the Subcommittee:

I am grateful to have been asked by the Subcommittee to testify today in support of the Prenatal Nondiscrimination Act (PRENDA) of 2016, H.R. _____.

Passing this bill is a necessary and proactive step in the fight to end gender inequality domestically and abroad. Many assume that blatant acts of sex discrimination have been all but eliminated in the United States, yet a violent form of discrimination in the form of sex selective abortion, practiced on girls in particular, is still permitted within our borders.

Sex selective abortion is defined as choosing to abort a preborn child based solely on the child's sex. Any discrimination against a unique human individual based on sex alone constitutes sex discrimination. Congress has the opportunity, through the passage of H.R. _____ to prohibit the discriminatory practice of sex-selective abortion, thereby confirming the fact that women have the same inherent human and civil rights as men.

I intend to testify to the existence of sex discrimination through sex-selective abortion, the seriousness of such discrimination, and the legal and moral justifications for the enactment of this

legislation. My comments are condensed from my extensive research paper, just published by the Charlotte Lozier Institute.¹

The findings on sex-selective abortion listed in the proposed Prenatal Nondiscrimination Act are extensive. They serve to highlight the prevalence of the problem of sex discrimination against females via abortion, the consequences of the practice, and the necessity of protective measures to prevent it.

The Prevalence of Sex Selective Abortion as a Tool for Sex Discrimination

A ban on sex selective abortion is necessary to protect girls in particular from the practice of “gendercide.”

One of the newest and most comprehensive analysis of prenatal sex ratios, conducted by Orzack et al. confirms the biological fact that about half of all babies at conception are male. “Our estimate of the sex ratio at conception is 0.5 (proportion male), which contradicts the common claim that the sex ratio at conception is male biased.”² Additionally, there is little to no variation in sex ratios in relation to maternal race or age.³ The ratio of boys to girls at birth consistently averages around 103-106 boys for every 100 girls (a ratio of 1.03-1.06); thus China’s 2014 sex ratio at birth of 115.88,⁴ for example, is too high to be explained away by non-existent “natural variations” or expensive pre-conception gender selection procedures. Well-documented practices of infanticide and sex selective abortion of female children have resulted in sex ratios at birth (SRBs) so skewed that it is estimated that there are

¹ Higgins, A. (2016, April 12). Charlotte Lozier Institute. American Reports Series. *Sex-Selection Abortion: The Real War on Women*. Retrieved from <https://lozierinstitute.org/sex-selection-abortion-the-real-war-on-women>

² Orzack S. H., et al. (2015) The human sex ratio from conception to birth. *Proc Natl Acad Sci USA*, 10.1073/pnas.1416546112 at 1.

³ Id. at 3. Orzack et al. further explained the methodology, “We analyzed maternal age (MA) as a metric predictor of the CSR (Table 4). The model without age has strong support (ER ~ 33), which suggests that there is no association between the CSR and maternal age; most studies indicate that maternal age has little or no influence on the sex ratio at birth (45–46). Analysis of limited data (n = 819) suggested that there is no association between mother’s race and the CSR. We compared an overall model, a model stratified between black and nonblack mothers, and a model stratified between white and nonwhite mothers. The overall model had substantially greater support than either stratified model.” Orzack’s research does not indicate that birth order affects the consistent CSR – an approximately equal balance of boys and girls at conception.

⁴ Littlejohn, R., Women’s Rights Without Frontiers. (2015, April 9). *Chinese Men Outnumber Women by 33 Million After Decades of Gender Bias*. Retrieved from <http://www.womensrightswithoutfrontiers.org/blog/?p=1969>

upwards of 160 million “missing” girls from the global population.⁵ Such a disparity has been shown to lead not only to increased violence in societies with extremely high SRBs, but also to increases in instances of human trafficking of girls in places where the female population is a fraction of the male population.⁶

Sex selection in favor of males is known to be a problem in certain cultures based on the idea of “son preference,” or the tendency to value a male child for economic reasons or for the purpose of carrying on a family name. The practice of son preference is not limited to Asian cultures or countries. In fact, several European countries have numbers similar to that of China and India, particularly in the Caucasus.⁷

Opponents of sex selective abortion bans claim this precaution is not needed in the United States because sex ratios overall in the U.S. appear to be balanced (105 males to 100 females). The balanced ratio belies the fact that western nations such as the UK and the United States have seen a spike in sex ratio imbalance within certain immigrant populations (specifically “Asian-Pacific”) inside their borders within the last twenty years.⁸ The most comprehensive study on the incidence of sex ratio imbalance in the U.S. among immigrant populations, conducted by Almond and Lena Edlund, found the most significant imbalance occurred in families with two daughters. Third births revealed an extreme imbalance of 151 boys to 100 girls.⁹ The latest research out of Canada, released just this

⁵ Hvistendahl, M. (2011) *Unnatural Selection: Choosing Boys over Girls, and the Consequences of a World Full of Men*, Public Affairs Publishing, p. 5-6. Hvistendahl estimates that 163 million females were demographically “missing” from Asia alone as early as 2005. See also, It’s a girl, <http://www.itsagirlmovie.com/>; *The Economist*. The War on Baby Girls, Gendercide. March 4, 2010. <http://www.economist.com/node/15606229>; United Nations Population Fund, Prenatal Sex Selection. <http://www.unfpa.org/prenatal-sex-selection#sthash.LGF4HN5f.dpuf>; Littlejohn, R., Women’s Rights Without Frontiers. (2015, April 9). *Chinese Men Outnumber Women by 33 Million After Decades of Gender Bias*. Retrieved from <http://www.womensrightswithoutfrontiers.org/blog/?p=1969>; A.R. Chapman, P.A. Benn (Autumn 2013). Noninvasive Prenatal Testing for Early Sex Identification: A Few Benefits and Many Concerns. *Perspectives in Biology and Medicine*, VOL. 56 NO. 4, pp. 530-547. Johns Hopkins University Press. DOI: 10.1353/pbm.2013.0034.

⁶ A.R. Chapman, P.A. Benn (Autumn 2013). Noninvasive Prenatal Testing for Early Sex Identification: A Few Benefits and Many Concerns. *Perspectives in Biology and Medicine*, VOL. 56 NO. 4, pp. 530-547. Johns Hopkins University Press. DOI: 10.1353/pbm.2013.0034.

⁷ Gendercide in the Caucasus, Son-preference, once suppressed, is reviving alarmingly. (2013, September 21). *The Economist*. Retrieved from <http://www.economist.com/news/europe/21586617-son-preference-once-suppressed-reviving-alarmingly-gendercide-caucasus>

⁸ Nicholas Eberstadt, “The Global War Against Baby Girls,” *The New Atlantis*, Number 33, Fall 2011, pp. 3-18. Noting, “In both the United States and the United Kingdom, these gender disparities were due largely to sharp increases in higher-parity SRBs, strongly suggesting that sex-selective abortions were the driver. The American and British cases also point to the possibility that sex-selective abortion may be common to other subpopulations in developed or less developed societies, even if these do not affect the overall SRB for each country as a whole.” Retrieved from <http://www.thenewatlantis.com/publications/the-global-war-against-baby-girls>

⁹ Almond, D. & Edlund, L. (2008) Son-Biased Sex Ratios in the 2000 United States Census 105 PNAS 5681

week, confirms this phenomenon. The first study, which examines variations in male–female infant ratios among births to Canadian- and Indian-born mothers, from 1990–2011 found that by the third birth, 138 boys were born to Indian-born mothers for every 100 girls, and by the fourth birth, 166 boys were born to every 100 girls.¹⁰ The second study more closely implicates the culprit of such skewed ratios – sex-selective abortion. The study compared sex ratios at birth after induced abortion among Canadian-born and non-Canadian-born women. The study found that within the province (Ontario), women from India who already had two daughters gave birth to 196 boys for every 100 girls. If an Indian-born mother with two daughters received an abortion before her third child, the ratio jumped to 326 boys for every 100 girls, and 409 boys for every 100 girls if the mother had multiple abortions.¹¹

Additionally, in the U.S., sex selective abortion and advanced medical technologies traditionally used to diagnose disease - preimplantation genetic diagnosis and noninvasive prenatal testing - are being used to select the sex of offspring, a practice called “family balancing.” Multiple countries, including Canada, have banned the practice of in vitro fertilization for the purposes of sex selection. The commentary on the two new Canadian studies suggests that people in countries that have banned the practice may be taking advantage of the lax regulation in the U.S. by traveling here to practice sex-selective IVF.¹²

Finally, although we know from studies and personal testimony that sex selective abortion is taking place in the U.S., because the U.S. does not currently require mandatory reporting of abortion statistics, there is no way to actually quantify the number of sex selective abortions that take place. The sex ratio at conception and birth remains almost 50:50 (with a slight male-bias) without regard to race or maternal age.¹³ Because this number is so reliable, an analysis of induced abortions in the U.S. should shed light on whether or not a bias exists. However, the abysmal state of abortion data in the U.S. prevents us from making such an important determination.

¹⁰ Urquia ML, Ray JG, Wanigaratne S, et al. Variations in male– female infant ratios among births to Canadian- and Indian-born mothers, 1990–2011: a population-based register study. *CMAJ Open* 2016; 4(2):E116-23.

¹¹ Urquia ML, Moineddin R, Jha P, et al. Sex ratios at birth after induced abortion. *CMAJ* 2016 Apr. 11 [Epub ahead of print].

¹² Abdool S. Yasseen III MSc GDip, Thierry Lacaze-Masmonteil MD PhD. early release COMMENTARY Male-Biased Infant sex ratios and patterns of induced abortion. *CMAJ*, April 11, 2016 DOI:10.1503 /cmaj.160183

¹³ 9 Orzack SH, et al. (2015). The human sex ratio from conception to birth. *Proc Natl Acad Sci USA*, 10.1073/pnas.1416546112

If researchers and policy-makers are truly interested in obtaining more accurate numbers of abortions done for reasons of sex selection in the U.S., then rather than deny the need for bans on sex-selective abortion in the U.S., they would do well to make an effort to push for mandatory reporting of abortion data.

No matter the scale of the sex selective abortion practice in the U.S., the fact remains that it exists. Thus, the question before us is whether any abortion done for reasons of sex selection is permissible in light of our tradition and laws protecting persons from discrimination based on sex alone. The American public is overwhelmingly supportive of sex selective abortion bans. The latest poll conducted by the Charlotte Lozier Institute in 2012¹⁴ found that 77% of respondents opposed abortion in instances of sex selection (specifically abortion of girls). These results reflect the long-held legal traditions and mores of Americans in support of individual equality without respect to race, ethnicity, or sex.

Legal Justifications of a ban

Sex discrimination violates a fundamental liberty guaranteed by the Constitution – equal protection under the law. The equal protection standard is applicable to gender-based classifications and “require[s] ‘an exceedingly persuasive justification’ in order to survive constitutional scrutiny.”¹⁵ Sex discrimination is also prohibited by Title VII of the Civil Rights Act of 1964¹⁶ which addresses

¹⁴ Charlotte Lozier Institute, Sex-selection Abortion: Worldwide Son-bias Fueled by Population Policy Abuse, May 30, 2012. <https://www.lozierinstitute.org/sex-selection-abortion/>. Noting that, “The CLI poll of 1,016 U.S. adults found that, overall, 77 percent of respondents answered ‘yes’ when asked, “When the fact that the developing baby is a girl is the sole reason for seeking an abortion, do you believe that abortion should be illegal?” Only 16 percent of all respondents said that abortion should be legal in this circumstance. Among women, support for a law making sex-selection abortion illegal is higher (80-13 percent) than it is among men, who favor such a law by a margin of 74-18 percent. Support for a protective law is found among all age groups, but is highest among those age 45-54 where a ban is supported 87-11 percent. By region, support for a ban ranges from a high of 81 percent in the Midwest and South to 68 percent in the West.”

¹⁵ J. E. B. v. Alabama ex rel. T. B. 511 U.S. 127 at 136 (1994).

¹⁶Civil Rights Act of 1964, Pub.L. 88-352, 78 Stat. 241 (1964), “An Act: To enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.”

discriminatory employment practices, prohibiting employment discrimination on the basis of sex, race, color, religion, or national origin.¹⁷

If addressed by a U.S. court, the issue of a sex-selective ban would be one of first impression. Opponents of sex-selective bans assert that such abortions fall under laws protecting reproductive autonomy. If analyzed in that context, the ban would be subject to the “undue burden standard,” which says that a state may not place a substantial obstacle in the path of a woman seeking an abortion prior to viability.

Sex-selection bans do not violate that standard. A ban on sex-selective abortion is, for the state, an expression of respect for life and a mechanism by which it can protect a person from sex discrimination. A ban on sex selective abortion eliminates only a single discriminatory reason to obtain an elective abortion. Based on the Supreme Court’s reasoning in upholding a ban on partial birth abortion in *Gonzales v. Carhart*, because numerous other options exist for a woman seeking an elective abortion, the “substantial obstacle” argument collapses.

Second, the abortion right is balanced in light of the legitimate state interest in protecting the health of the mother and life of the fetus from the outset of pregnancy.¹⁸ The state’s interest in regulation was highlighted in *Gonzales v Carhart*: “[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.”¹⁹ Sex-selective bans not only prohibit discrimination against a person based on sex—a compelling governmental interest—they also protect the pregnant woman from cultural or familial pressure to have an abortion by penalizing such coercion.²⁰

¹⁷ *Id.* at Title VII, making it unlawful to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”

¹⁸ *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 at 846 (1992).

¹⁹ *Gonzales v. Carhart*, 550 U.S. 124 (2008)

²⁰ See also, Testimony of Steven H. Aden, Vice President/Senior Counsel, Human Life Issues, *Alliance Defense Fund*. Hearing of the House Judiciary Committee, Subcommittee on the Constitution Regarding H.R. 3541, the Prenatal Nondiscrimination Act. (2011 December 6). Testifying that “[T]he Supreme Court has made it clear that

Third, and on top of all this, construing the abortion right to include sex-discrimination abortion would take the Court and the country in the wrong direction. Aborting a child for reasons of sex alone is not an exercise of reproductive autonomy, but rather one of discrimination based on immutable characteristics. The real issue when it comes to aborting a child based on sex alone, as articulated by Barbara Katz Rothman in her book on prenatal diagnosis, is not *whether* or not to have a child, but rather, what *kind* of child to have.²¹ The abortion right should not include the right “to bear or abort a *particular* child” based on particular traits such as gender.²²

Moral Considerations

The practice of sex-selective abortion implies a right to choose not just whether or not to have a child, but the right to choose the characteristics of a child. The ethical implications of such a practice are numerous and unacceptable. The result of continuing to allow this practice is an implicit approval of the practice of assigning value to a person based on his or her sex alone.

As noted in the findings of this bill, Congress has “expressed repeatedly, through Congressional resolution, strong condemnation of policies promoting sex-selective abortion in the ‘Communist Government of China.’” Additionally, the U.S. delegation to the Commission on the Status of Women, The United Nations Commission on the Status of Women, The American Congress of Obstetricians and Gynecologists, The American Society of Reproductive Medicine, a working paper from the President’s Council on Bioethics, Secretary Clinton, the WHO, and Nobuko Horibe, the Director of the United Nations Population Fund’s Asia and Pacific Regional Office, among others,

States have a compelling interest in eliminating discrimination against women and minorities. Moreover, the *Casey* Court also affirmed the principle that “the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus....” [punctuation is off here – quotation marks]

²¹ Chapman and Benn referencing Barbara Katz Rothman, *The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood*. (1986).

²² Brief at 18, <http://www.adfmedia.org/files/HorneIsaacsonAmicusBDF.pdf>. This brief argues more fully, “[T]his Court has never endorsed a right to abort children only because they have been detected to have a disability. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), this Court repeatedly premised its reaffirmation of abortion rights in terms of the right to terminate an unintended pregnancy.” The brief goes on to argue “This Court quoted approvingly from its statement in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), that the liberty under consideration in *Casey* pertained to “the decision whether to bear or beget a child,” *Casey*, 505 U.S. at 851. This Court has never framed the protected abortion decision as whether to bear or abort a *particular* child based on identified traits of genetic variation, disability, or other health condition. Instead,” the brief argues, “*Casey* formulated the abortion decision as one confronting a woman ‘when the woman confronts the reality that, despite her attempts to avoid it, she has become pregnant,’” *id.* at 853 – not when she accepts a pregnancy at first, but then comes to perceive the child she is carrying as defective.” The same analysis should apply to sex-discrimination abortion.

have expressed ethical concerns and/or disapproval for the practice of eliminating girls through infanticide or sex selection.²³

Not only is such a choice unethical, there are serious concerns that women who resist getting an abortion for reasons of sex selection are subject to pressure, coercion, and violence. Pressure to abort in communities where son preference exists is a reality for some women in the United States. Dr. Puri documented the sad predicament of women who were aborting their daughters in the United States because of pressure from family members.²⁴ The findings of this bill note additional research showing the danger of “forced abortion” on women.

Sex-selective abortion bans protect women who find themselves in such situations because they provide for the punishment of persons involved in the coercion.²⁵ This bill, for instance, would penalize only persons who perform the sex-selective procedure and those who have coerced or solicited the pregnant mother to have the procedure. The mother is excluded from prosecution. Furthermore, intent and/or knowledge are required for liability to attach.²⁶ Any woman who has been subject to a sex-selective abortion against her will is additionally protected by the ability to bring a civil action against the perpetrator, in which she can receive relief in the form of verifiable money damages as well as punitive damages.²⁷

Conclusion

We must accept that sex-selective abortions occur globally, even in the United States, and acknowledge the serious consequences that result from gender imbalances and the refusal to

²³ H.R. _____ (1) Sec. (H-K); Mitchell, A. (2013). Clinton on women’s rights, Middle East peace. *MSNBC*. [Interview Transcript]. Retrieved from http://www.nbcnews.com/id/35877287/ns/msnbc-andrea_mitchell_reports/t/clinton-womens-rights-middle-east-peace/#.VTK4KPnF8bM; Landler, M. (August 18, 2009). Saving the World’s Women. A New Gender Agenda. *The New York Times Magazine*. <http://www.nytimes.com/2009/08/23/magazine/23clinton-t.html?pagewanted=1&r=0>; World Health Organization Genomic Resource Centre, Gender and Genetics. Sex Selection and Discrimination, Ethical Issues Raised by Sex Selection. <http://www.who.int/genomics/gender/en/index4.html>; United Nations Population Fund, News. (5 October 2011). *Ending Gender Imbalances Must Remain International Priority, Says UNFPA’s Asia-Pacific Director*. Retrieved from <http://www.unfpa.org/news/ending-gender-imbalances-must-remain-international-priority-says-unfpa%E2%80%99s-asia-pacific-director>

²⁴ Puri, S. (2011, August 2). I Know it’s a Girl and I Need Your Help to Get it Out of Me. *Slate*. Retrieved from http://www.slate.com/articles/double_x/doublex/2011/08/i_know_its_a_girl_and_i_need_your_help_to_get_it_out_of_me.2.html

²⁵ H.R. 3541 Sec. 3(a), adding Sec. 249(a)(2), (3) of Ch. 13, tit. 18 U.S.C. (2011).

²⁶ H.R. _____ Sec 250 (a)

²⁷ H.R. _____ Sec 250 (b)

condemn sex-selective abortion. Sex-selective abortion perpetuates sex discrimination in general and specifically the attitude that male children are preferable and somehow superior to female children.

Reversal of sex discrimination in the United States begins with implementing sex-selective abortion bans such as this proposed Prenatal Nondiscrimination Act, and instituting national abortion reporting requirements. Allowing these facts to inform our public policy and taking the steps necessary to eliminate sex-selective abortion will put the United States squarely on the frontlines in fighting the actual “war on women.” Such a stance will create a platform from which the U.S. can affirm the unique value of each individual, and publically condemn unjust discrimination against either sex.

In light of all these considerations, I ask that you vote in favor of the Prenatal Nondiscrimination Act.