

1 WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY
2 By: William G. Montgomery (021246)
Montgomw@mcao.maricopa.gov
3 Douglas L. Irish (002288)
Irishd@mcao.maricopa.gov
4 J. Kenneth Mangum (003077)
mangumk@mcao.maricopa.gov
5 Louis F. Comus III (020413)
Comusl@mcao.maricopa.gov
6 222 North Central Avenue, Suite 1100
Phoenix, Arizona 85004
7 Telephone (602) 506-8541
Facsimile (602) 506-8567
8 MCAO Firm No. 00032000

9 ALLIANCE DEFENDING FREEDOM
Michael Casey Mattox*
10 cmattox@alliancedefendingfreedom.org
11 801 G Street NW, Suite 509
Washington, DC 20001
12 Telephone: (202) 393-8690
13 Facsimile: (480) 347-3622

14 Jeremy D. Tedesco (023497)
jtedesco@alliancedefendingfreedom.org
15 15100 North 90th Street
16 Scottsdale, Arizona 85260
17 Telephone (480) 444-0020
Facsimile (480) 444-0028

18 Attorneys for Defendant-Intervenors for intervention
19 *Application for admission *pro hac vice* forthcoming

20 **IN THE UNITED STATES DISTRICT COURT**
21 **FOR THE DISTRICT OF ARIZONA**

22 National Association for the
23 Advancement of Colored People,
24 Maricopa County Branch, National
Asian Pacific American Women's
25 Forum,

26 Plaintiff,

27 v.

28 Tom Horne, Attorney General of
Arizona, in his official capacity; Arizona

No. 2:13-cv-01079-PGR

**MOTION TO INTERVENE AS
DEFENDANTS**

**MEMORANDUM IN SUPPORT OF
MOTION TO INTERVENE**

EXHIBITS

1 Medical Board; and Lisa Wynn,
2 Executive Director of the Arizona
3 Medical Board, in her official capacity,

4 Defendants.

5 and

6 William G. Montgomery, Maricopa
7 County Attorney, in his official capacity;
8 Representative Steve Montenegro, in his
9 official capacity; and Frederick Douglass
10 Foundation,

11 Defendant-Intervenors

**(PROPOSED) ORDER GRANTING
MOTION TO INTERVENE**

ORAL ARGUMENT REQUESTED

12 **MOTION TO INTERVENE AS DEFENDANTS AND**
13 **MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

14 COME NOW proposed Defendant-Intervenors pursuant to FED. R. CIV. P. 24(a)(2),
15 intervention of right, and alternatively, Rule 24(b), permissive intervention, and hereby
16 move for leave to intervene as party Defendants in the above-captioned case. In support
17 of this motion, proposed Defendant-Intervenors rely on the accompanying Memorandum
18 of Points and Authorities in Support of Motion to Intervene and attached declarations.
19 Pursuant to FED. R. CIV. P. 24(c), proposed Defendant-Intervenors also submit herewith
20 the accompanying proposed Answer to Complaint, attached as Exhibit A hereto.

21 **STATEMENT REGARDING ORAL ARGUMENT**

22 This case presents important issues regarding the ability of a public official to
23 enforce statutes which specifically identify him as an enforcing party. This case also
24 presents issues of broad public importance regarding the ability of public interest groups
25 to intervene to defend a state statute for which the organizations have advocated and
26 which protect the constitutional and statutory rights of their members. Oral argument will
27 assist this Court in reaching a full understanding of the motion, and allow the attorneys for
28 all parties the opportunity to address any outstanding factual or legal issues which this

1 Court deems relevant. Defendant-Intervenors believe that oral argument is necessary to
2 address these matters thoroughly.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**
4 **DEFENDANT-INTERVENORS' INTERESTS**

5 William G. Montgomery, Maricopa County Attorney, is the chief law enforcement
6 officer in Maricopa County. Decl. of William G. Montgomery, ¶¶ 1, 2 (“Montgomery
7 Decl.”, attached as Exhibit B hereto). As such, he is sworn to uphold Arizona statutes,
8 including Ariz. Rev. Stat. Ann §§ 13-3603.02, and 36-2157.¹ Montgomery Decl. at ¶ 2.
9 Plaintiffs admit the County Attorney’s express role in enforcing the statutes at issue in
10 Paragraph 19 of the Complaint. Intervention will grant Mr. Montgomery, and through
11 him the citizens of Maricopa County, the right to protect and preserve a statute passed for
12 their protection. Montgomery Decl. at ¶ 3.

13 Representative Steve B. Montenegro is an elected member of the Arizona House of
14 Representatives, previously serving as Speaker Pro Tempore. Decl. of Steve B.
15 Montenegro, ¶ 3 (“Montenegro Decl.”, attached as Exhibit C hereto). Representative
16 Montenegro was the primary sponsor of HB 2443. Montenegro Decl. at ¶ 6.
17 Representative Montenegro serves on the Government, Higher Education Innovation and
18 Reform, and Rules Committees. Montenegro Decl. at ¶ 3. Representative Montenegro
19 testified in favor of the Act, expended personal and political capital supporting the Act,
20 spoke in favor of the Act in the Arizona House of Representatives, and voted for its
21 passage. *Id.* at ¶¶ 8-10, 29. Representative Montenegro has a legislative interest in
22 protecting the effectiveness of his efforts in sponsoring and voting for HB 2443. *Id.* at ¶
23 29. He also has an interest in ensuring that misrepresentations of his statements and
24 beliefs and those of his fellow legislators are corrected in the public record and not used to
25 mislead the Court concerning the purpose of this law or the motivations and beliefs of

26 ¹ “It would seem supererogatory to say that the county attorney is a constitutional officer charged
27 with the responsibility of enforcing the public laws, Ariz. Const. art. 12, §§ 3 and 4; Ariz. Rev.
28 Stat. § 11-532, as amended.” *State Ex Rel Berger v. Myers*, 108 Ariz. 248, 495 P.2d 844 (Ariz.
1972).

1 those who supported it. *Id.* at ¶¶ 32-34.

2 The Frederick Douglass Foundation (“TFDF”) is a non-profit Christian multi-
3 ethnic educational and public policy organization that seeks to educate and empower
4 black communities to be self-sufficient. Declaration of Tim Johnson (“Johnson Decl.”,
5 attached as Exhibit D hereto), ¶ 3. With over one thousand members in chapters across the
6 country – including Arizona members - and over five thousand followers, TFDF is the
7 largest organization of its kind. Johnson Decl. ¶ 7. TFDF believes in the sanctity of human
8 life and rejects abortion. *Id.* at ¶ 5. It educates black communities about the historic
9 practice of eugenics to target and eliminate African-Americans and other racial minorities.
10 *Id.* at ¶ 6. It also educates black communities that Planned Parenthood, the nation’s largest
11 abortionist, is targeting their communities, reducing their voice, and that the practice of
12 abortion is hurting – not helping – black communities and families. *Id.* at ¶ 7.

13 TFDF strongly supported and expended resources advocating for the passage of
14 HB2443, titled in part for its namesake, the great abolitionist Frederick Douglass. *Id.* ¶ 8.
15 Noting that while African-Americans make up only 5% of Arizona’s population they
16 comprise 30% of the victims of Arizona abortions, TFDF urged the legislature to stop the
17 targeting of racial minorities through abortion. *Id.* at ¶ 8.

18 ARGUMENT

19 I. DEFENDANT-INTERVENORS ARE ENTITLED TO INTERVENE OF RIGHT 20 UNDER FED. R. CIV. P. 24(A).

21 Federal Rule of Civil Procedure 24(a) provides:

22 On timely motion, the court must permit anyone to intervene who . . . claims
23 an interest relating to the property or transaction that is the subject of the
24 action, and is so situated that disposing of the action may as a practical
matter impair or impede the movant’s ability to protect its interest, unless
existing parties adequately represent that interest.

25 FED. R. CIV. P. 24(a). *See also Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998).
26 Rule 24(a) is construed broadly in favor of potential intervenors. *United States v. Alisal*
27 *Water Corp.*, 370 F.3d 915, 919 (9th Cir. 2004); *United States v. City of Los Angeles*, 288

1 F.3d 391, 397 (9th Cir. 2002). In addition to this broad construction, review of the motion
2 is “guided primarily by practical considerations, not technical distinctions.” *Southwest*
3 *Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (internal
4 quotations omitted).

5 A. Proposed Defendant-Intervenors are Not Required to Demonstrate
6 Independent Standing to Intervene in This Action to Defend the Act.

7 Several Circuits have held that “there [i]s no need to impose the standing
8 requirement upon [a] proposed intervenor” because “[t]he existence of a case or
9 controversy ha[s] been established as between the [existing parties].” *U. S. Postal Serv. v.*
10 *Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (intervention denied on other grounds); *see*
11 *Hoblock v. Albany Cty. Bd. of Elections*, 233 F.R.D. 95, 97 (N.D.N.Y. 2005) (“there is no
12 Article III standing requirement in the Second Circuit, with an intervenor only needing to
13 meet the Rule 24(a) requirements and have an interest in the litigation”) (citing with *see*
14 signal *Brennan*, 579 F.2d at 190; citing with *see also* signal *San Juan Cty., Utah v. United*
15 *States*, 420 F.3d 1197, 1204-05 (10th Cir. 2005) (discussing differences between Circuits
16 in addressing standing requirements for intervention); *Associated Builders & Contractors*
17 *v. Perry*, 16 F.3d 688, 690 (6th Cir.1994) (no independent intervenor standing required);
18 *but cf. Planned Parenthood of Mid-Missouri & Eastern Kansas, Inc. v. Ehlmann*, 137
19 F.3d 573, 576-77 (8th Cir.1998); *Building & Const. Trades Dep't v. Reich*, 40 F.3d 1275,
20 1282 (D.C.Cir.1994); and *Prete v. Bradbury*, 438 F.3d 949 (9th Cir. 2006) (open question
21 in the Ninth Circuit). That is particularly true here where the intervenors seek to merely
22 defend the statutes, not bring any new claims for the Court’s adjudication.

23 In deciding a motion to intervene as of right, the Court considers four factors:

- 24 (1) whether the application for intervention is timely;
25 (2) whether the applicant has a “significantly protectable” interest relating to
26 the property or transaction that is the subject of the action;
27 (3) whether the applicant is so situated that the disposition of the action
28 may, as a practical matter, impair or impede the applicant’s ability to protect
that interest; and

1 (4) whether the applicant's interest is adequately represented by the parties
2 in the lawsuit.

3 *Berg*, 268 F.3d at 817. Intervenors readily satisfy the test for intervention as of right.

4 B. Defendant-Intervenors' Motion is Timely.

5 Defendant-Intervenors' motion is timely under FED. R. CIV. P. 24(a). *See League*
6 *of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) (describing
7 timeliness considerations). Defendant-Intervenors have promptly filed their motion to
8 intervene weeks after Plaintiffs filed their complaint, before any ruling on substantive
9 motions, and before any responsive pleading has been submitted by or is even due from
10 Defendants. Defendant-Intervenors do not intend to seek any delay in the case. Thus, this
11 motion will cause neither prejudice to the existing parties or any delay in these
12 proceedings. Under these circumstances, this motion is clearly timely.

13 C. Defendant-Intervenors Have Sufficient Interests Relating to the
14 Subject Matter of This Action.

15 The Ninth Circuit does not consider the interest requirement of FED. R. CIV. P.
16 24(a) as a "determinative criterion for intervention." *Fresno County v. Andrus*, 622 F. 2d
17 436, 438 (9th Cir. 1980). "Whether an applicant for intervention demonstrates sufficient
18 interest in an action is a practical, threshold inquiry. No specific legal or equitable interest
19 need be established." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir. 1993). Rather,
20 to satisfy this minimal burden "[i]t is generally enough that the interest [asserted] is
21 protectable under some law, and that there is a relationship between the legally protected
22 interest and the claims at issue." *Sierra Club v. United States EPA*, 995 F.2d 1478, 1484
(9th Cir. 1993).

23 1. Defendant-Intervenor William Montgomery Has a Protectable
24 Interest in Defending His Authority to Prosecute Violations of HB
25 2443 Because His Obligation to Enforce the Statute at Issue is
26 Identical to the Enforcement Obligation of the Other Named
27 Defendants, Stated by Plaintiffs as the Basis for This Court's
28 Jurisdiction.

Applicant William Montgomery is the County Attorney for Maricopa County,

1 Arizona. He is responsible for upholding the laws of the State of Arizona and is
2 empowered by HB 2443 to prosecute violations of the law. The challenged law
3 specifically authorizes a County Attorney, in addition to the Attorney General, to enforce
4 its provisions. Arizona Rev. Stat. 13-3603.02(B). (“The attorney general or the county
5 attorney may bring an action in superior court to enjoin the activity described in
6 subsection A of this section.”)

7 Plaintiffs’ own complaint named the three existing Defendants in their
8 official capacities, expressly because they are, in their official capacities, obligated
9 to enforce the statutes at issue. Complaint at ¶7 (Attorney General Horne); ¶8
10 (Arizona Medical Board); and ¶9 (Medical Board Director Wynn, in her official
11 capacity). Defendant-Intervenor Mr. Montgomery is identically-situated to these
12 Defendants for purposes of this case.²

13 Applicant Montgomery thus possesses the same coextensive authority and
14 responsibility as the Defendant Attorney General to prosecute violations of the Act. He
15 has a significant protectable interest in defending this law from Plaintiffs’ challenge.

16 2. Defendant-Intervenor Representative Montenegro Has a
17 Protectable Interest, Pursuant to the Nullification Doctrine Set
18 Forth in *Raines* and *Coleman*, as the Sponsor of HB 2443, as a
19 Legislator Who Voted for That Bill, and Due to Plaintiffs’
20 Reliance on Misrepresentations of His and Other Legislators’
21 Statements.

22 Defendant-Intervenor Representative Montenegro, acting in his official capacity,
23 has a right to intervene because his legislative vote in favor of HB 2443 is in jeopardy of
24 being invalidated by Plaintiffs’ suit. Each legislator who sponsors a bill, or campaigns for
25 a bill, or ultimately votes for a bill, has a valid legal interest in defending the bill that he or
26 she sponsored or supported. The Supreme Court has said as much: “[L]egislators whose

27 ² Notably, in *Isaacson v. Horne*, 884 F.Supp.2d 961 (D. Ariz. 2012), filed as Docket No.
28 2:12-cv-10501-JAT-PHX, the Plaintiffs – represented by some of the same counsel as
Plaintiffs here – also sued William Montgomery because of his responsibilities as
Maricopa County Attorney. It is unclear why they believed him a necessary party in that
case but not in this case where the challenged statute specifically authorizes him to
enforce its provisions.

1 votes would have been sufficient to defeat (or enact) a specific legislative act have
2 standing to sue if that legislative action goes into effect (or does not go into effect), on the
3 ground that their votes have been completely nullified.” *Raines v. Byrd*, 521 U.S. 811, 823
4 (1997) (internal citation to footnote omitted). *See also Kennedy v. Sampson*. *See* 511 F.2d
5 430, 435 (D.C. Cir. 1974) (“an individual legislator has standing to protect the
6 effectiveness of his vote”). Additionally, in *Coleman v. Miller*, the Supreme Court held
7 that members of the Kansas Senate had a “plain, direct and adequate interest in
8 maintaining the effectiveness of their votes.” 307 U.S. 433, 438 (1939). There, the
9 legislators’ votes on a specific bill would likewise have been nullified. “As the Court
10 recognized over a half century ago, state legislators claiming that their votes ‘have been
11 overridden and virtually held for naught’ ... have a sufficient stake in the outcome under
12 Article III to vindicate their interests in federal court.” *Yniguez v. State of Arizona*, 939
13 F.2d 727, 732 (1991), quoting *Coleman*, 307 U.S. at 438. Thus, courts have often
14 permitted legislators to intervene to defend statutes that they sponsored and supported in
15 becoming law. *See, e.g., Horne v. Flores*, 557 U.S. 443 (2009) (Arizona Speaker of the
16 House and Senate President intervened to defend state law); *Amos v. Sims*, 409 U.S. 942
17 (1972) (state legislators intervened to defend state apportionment).

18 Additionally, Representative Montenegro has a protectable interest in his own
19 professional reputation, which Plaintiffs have placed directly into controversy by
20 attempting to impute racially insensitive motives for his support for HB 2443 and relying
21 on those misrepresentations to claim that the law was therefore motivated by some
22 improper animus. Plaintiffs have thus demonstrated in their complaint that they intend to
23 challenge this law in large part by misrepresenting or pulling out of context statements
24 made by members of the Arizona legislature, including Representative Montenegro.
25 Representative Montenegro has a protectable interest in ensuring that his own professional
26 reputation and that of fellow members whose support for HB 2443 he sought is not
27 unfairly disparaged by Plaintiffs in this action and that the record before the Court is
28 accurate.

1 3. Defendant-Intervenor Frederick Douglass Foundation Has a
2 Protectable Interest Because They are Among, and Represent, the
3 Class of Beneficiaries Which HB 2443 (The Susan B. Anthony
4 and Frederick Douglass Prenatal Nondiscrimination Act) was
5 Intended to Protect, and Advocated For Its Passage.

6 Defendant-Intervenor Frederick Douglass Foundation has a sufficient interest
7 because its members are among and they advocate for the class of individuals the Arizona
8 Legislature sought to protect with HB 2443. *See Lockyer*, 450 F.3d at 441. In *Lockyer*,
9 the court found it clear that the proposed intervenors had a sufficient interest in statutory
10 protections for rights of conscience to warrant intervention because it “seem[ed] beyond
11 dispute that Congress passed the Weldon Amendment to protect health care providers like
12 those represented by the proposed intervenors.” *Id.* TFDF is a membership organization
13 with several thousand members and followers, including African-Americans, all of whom
14 are concerned about educating and advocating for African-American communities.
15 Johnson Decl. ¶ 7. These communities, including TFDF’s members and future members
16 are specifically protected by HB 2443 from having their lives terminated solely because of
17 the race of their fathers. HB 2443’s prohibition on race discrimination in abortion will
18 dissuade abortionists from targeting majority African-American communities, decreasing
19 their numbers and limiting the voice of African-Americans in public affairs. TFDF also
20 has a strong interest in preventing anyone from being coerced into an abortion for any
21 reason, but particularly because of the race of the father of the unborn child. As an
22 organization dedicated to advancing the real long-term interests of African-Americans and
23 African-American communities, The Frederick Douglass Foundation has a strong interest
24 in this law which seeks to stop race discrimination and race targeting in abortion.

25 TFDF also advocated for the passage of the Act. Johnson Decl. ¶ 8. The Ninth
26 Circuit has held that “a public interest group is entitled as a matter of right to intervene in
27 an action challenging the legality of a measure it has supported.” *Idaho Farm Bureau*
28 *Fed’n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (granting intervention as of right to
 environmental group that supported adding spring snails to endangered species list);

1 *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-27 (9th Cir. 1983) (finding
2 protectable interest by Audubon Society in suit against the Department of Interior
3 challenging the creation of a wildlife habitat area for which Audubon Society advocated).
4 The Frederick Douglass Foundation is a public interest organizations that has consistently
5 advocated for and continues to advocate for the sanctity of human life. Johnson Decl. ¶ 5.
6 It has particularly advocated against discrimination against African-Americans and other
7 minorities in abortion – educating the public and particularly African-Americans about the
8 historical practices of targeting racial minorities in eugenics and more recently in
9 abortions. Johnson Decl. ¶ 6. TFDF advocated specifically for HB 2443, urging the
10 Arizona legislature to enact this law to prevent discrimination against unborn African-
11 American children. Johnson Decl. ¶ 8.

12 Each Defendant-Intervenor easily satisfies the interest test for intervention of right.

13 D. The Defendant-Intervenors’ Interests May Be Impaired By This
14 Litigation Because Their Ability to Protect Their Rights Will Be
15 Impeded.

16 An intervenor need merely show that the disposition of the action “may as a
17 practical matter impair or impede its ability to protect its interest.” FED. R. CIV. P.
18 24(a)(2). See also *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998) (Intervenor
19 need only show that resolution of claims “actually will affect the applicant.”). This
20 requirement also is to be construed liberally. “If any applicant would be substantially
21 affected in a practical sense by the determination made in an action, [the applicant]
22 should, as a general rule, be entitled to intervene.” FED. R. CIV. P. 24(a)(2), Advisory
23 Committee Note; *City of Los Angeles*, 288 F.3d at 399 (“Whether an applicant’s interest
24 would be impaired by disposition of a lawsuit depends on the range of dispositions open
25 to a court about which an applicant is entitled to be concerned, not the specific disposition
26 the original parties are seeking to have the court approve.”), quoting *Brennan v. Conn.*
27 *State UAW Cmty. v. Action Program Council*, 60 F.R.D. 626, 631 (D. Conn. 1973); *Berg*,
28 268 F.3d at 822 (“We follow the guidance of Rule 24 advisory committee note [cited
above].”).

1 In *Lockyer*, the Plaintiffs sought to have a law declared unconstitutional *in toto*.
2 Assessing the impact of such a decision on the intervenors, the Ninth Circuit said,
3 “Having found that appellants have a significant protectable interest, we have little
4 difficulty concluding that the disposition of this case may, as a practical matter, affect it.”
5 450 F.3d at 442. The same is true here. Although Plaintiff complains only about the law’s
6 prohibition of racial discrimination, they seek to have the entire statute declared
7 unconstitutional. In light of the clear interest that each of the Defendant-Intervenors has in
8 this action challenging the validity of HB 2443, the Defendant-Intervenors’ interests will
9 certainly be affected by the disposition of this case.

10 Defendant-Intervenor County Attorney Montgomery easily satisfies the
11 impairment of interests test because should Plaintiffs obtain the relief they seek he will be
12 stripped of his authority and responsibility to prevent Maricopa County women from
13 being coerced into abortions due to the race of the father or the gender of the unborn child
14 or to enforce the law’s prohibition on performing abortions for these discriminatory
15 reasons.

16 Likewise, should Plaintiffs obtain the relief they seek Defendant-Intervenor
17 Montenegro’s efforts to sponsor this law, guide it through the legislative process, vote for
18 it and to secure votes from the members of the legislature necessary for its passage would
19 be negated. Additionally, Plaintiffs’ misrepresentations of his beliefs, positions and
20 statements and those of other members of the legislature who supported the law would
21 likely be unchallenged. Without his intervention in this matter, Rep. Montenegro believes
22 Plaintiffs will continue to disparage his reputation and that of other members of the
23 Arizona legislature.

24 The Frederick Douglass Foundation’s interest in this matter as a proponent of this
25 law who sought its passage would also be impaired by the relief Plaintiffs seek. As
26 proponents who expended effort and resources to support the law, they have the right to
27 seek to maintain the efficacy of those efforts and resources. Moreover, TFDF’s African-
28 American members and followers and the communities they educate and advocate for are

1 among the very class of persons the Act is intended to protect. The Act seeks to affirm the
2 humanity and equality of every unborn child and indeed every person regardless of race or
3 gender. The Act prohibits the discriminatory destruction of unborn human life because of
4 the child's gender or its father's race. Should Plaintiffs prevail, such discriminatory acts
5 would again be permitted by law, devaluing persons because of their race and gender and
6 permitting the destruction of the lives of the very persons that the Frederick Douglass
7 Foundation seeks to empower.

8 The movants' legal interests could unquestionably be at least as impaired by this
9 Court's rulings as those of other intervenors in other cases under Ninth Circuit case law.
10 *See, e.g., Sagebrush Rebellion*, 713 F.2d at 525 (finding potential impairment of interest
11 by national wildlife organization seeking to intervene as defendants in a suit brought
12 against the Department of Interior challenging the creation of a wildlife habitat area);
13 *Idaho Farm Bureau Fed'n*, 58 F.3d at 1392 (finding potential impairment of interest by
14 environmental group seeking to intervene as defendants in a suit brought by companies
15 against Fish & Wildlife Service challenging its categorization of a snail as an endangered
16 species). Defendant-Intervenors easily satisfy the impairment of interest requirement of
17 Rule 24(a)(2).

18 E. Defendants Will Not Adequately Represent Defendant-Intervenors'
19 Interests.

20 As the Supreme Court has stated, "[t]he requirement of the Rule [providing for
21 intervention as of right] is satisfied if the applicant shows that representation of his
22 interest 'may be' inadequate; and the burden of making that showing should be treated as
23 minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972) (cited
24 by *Sagebrush Rebellion*, 713 F.2d at 528). An applicant "ordinarily should be allowed to
25 intervene unless it is clear that the party will provide adequate representation for the
26 absentee." *United States v. American Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C. Cir.
27 1980). Moreover, "justice is best served when *all* parties with a real stake in a
28 controversy are afforded an opportunity to be heard." *Hodgson v. United Mine Workers
of America*, 473 F.2d 118, 130 (D.C. Cir. 1972). For the reasons below, Defendant-

1 Intervenor lack adequate representation by the existing Defendants because they expect
2 to assert unique legal arguments and their inclusion is necessary to ensure full factual
3 development of the record.

4 Although Defendant-Intervenors share some interests with the existing Defendants,
5 the divergence in their interests is more than sufficient to satisfy Rule 24(a)(2)'s
6 requirement that the intervenors' interests might not be adequately represented in this
7 litigation. The government defendants in this case are charged with protecting a broader
8 public interest that might not be consistent with Defendant-Intervenors' interests. *See*
9 *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1499 (9th Cir. 1995)
10 (federal agency, which must take a "broader view," would not adequately represent
11 "narrow, parochial" interests of intervening environmental groups). In fact, the Ninth
12 Circuit has recognized that for a government defendant to both represent the public
13 interest as well as the private interest of intervenors is "a task which is on its face
14 impossible." *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v.*
15 *Dep't of Interior*, 100 F.3d 837, 845 (10th Cir. 1996) (emphasis added).

16 In *Lockyer*, the court specifically held that the government defendants would not
17 adequately represent the proposed intervenor private parties, (i.e. medical associations in
18 that case), similarly situated as two of the Defendant-Intervenors in this case, because the
19 government defended a narrow reading of the challenged regulation, while the medical
20 associations advanced a broad reading of the regulation, revealing the divergent interests
21 of the avoidance of constitutional infirmity and the protection of conscience. *Lockyer*,
22 450 F.3d at 444 (citing *Prete v. Bradbury*, 438 F.3d 949, 958 (9th Cir. 2006)) ("We have
23 recognized that willingness to suggest a limiting construction in defense of a statute is an
24 important consideration in determining whether the government will adequately represent
25 its constituents' interests."). Additionally, the *Lockyer* court found that the proposed
26 intervenors brought "a point of view to the litigation not presented by either the plaintiffs
27 or the defendants." *Id.* at 445. In this case, Defendant-Intervenors are likely to advocate
28 for a more expeditious decision on the merits. They will also bring the perspective of

1 organizations and lawmakers that supported the challenged Act and whose perspective on
2 this Act and its impact for racial minorities is diametrically opposed to that of Plaintiffs.
3 Rather than believing the Act stigmatizes African-Americans, they view the Act as critical
4 to protecting African-Americans and other minority races from discrimination and
5 devaluation because of their race. They will present evidence and argument from personal
6 experience of that fact. Their inclusion as parties is necessary to rebut the Plaintiffs'
7 claims.

8 Plaintiffs' claims that the Act is unnecessary and itself discriminatory will be
9 rebutted by evidence from the Defendant-Intervenors of the problem of race and sex
10 selection abortions that the Act combats. While the Defendants may be enticed to seek to
11 defend the law by interpreting it more narrowly, the Defendant-Intervenors will advocate
12 for a liberal interpretation of the law to more effectively combat the problem that caused
13 them to champion this law, support its passage, and that Defendant-Intervenor
14 Montgomery is now prepared to prosecute.

15 Finally, participation of Defendant-Intervenor Montenegro is critically important to
16 any response to the Plaintiffs' allegations concerning his own statements, motives, and
17 those of other members with whom he worked to pass HB2443. While the Defendants
18 may not find it necessary to correct the Plaintiffs' misrepresentations in order to defend
19 the Act, Representative Montenegro will seek to insure that Plaintiffs' assertions are
20 rebutted in order to defend both the Act and his own and other members' reputations.
21 Defendant-Intervenors meet the final criteria for intervention of right under Rule 24(a).

22 II. IN THE ALTERNATIVE, DEFENDANT-INTERVENORS SHOULD BE
23 GRANTED PERMISSION TO INTERVENE UNDER FED. R. CIV. P. 24(B).

24 Federal Rule of Civil Procedure 24(b)(2) provides, "[o]n timely motion, the court
25 may permit anyone to intervene who . . . has a claim or defense that shares with the main
26 action a common question of law or fact." Furthermore, "[i]n exercising its discretion, the
27 court must consider whether the intervention will unduly delay or prejudice the
28 adjudication of the original parties' rights." FED. CIV. R. P. 24(c). Defendant-Intervenors
satisfy the requirements for permissive intervention. As demonstrated above, the

1 application for intervention is timely, filed only weeks after the initiation of this action
2 and well in advance of any decisions on the merits. The Defendant-Intervenors will also
3 raise common questions of law and fact with those asserted by the original parties.

4 Specifically, County Attorney Montgomery is expressly authorized to prosecute
5 violations of this Act and seeks to defend his coequal authority with the Attorney General
6 under the Act, raising common questions of law and fact with that to be raised by the
7 current Defendants and rebutting Plaintiff's claims. Representative Montenegro likewise
8 will raise common questions of law and fact, specifically rebutting the claims Plaintiffs
9 repeatedly make about his own motivations and those of his fellow members in enacting
10 this law. The Frederick Douglass Foundation will defend the Act against Plaintiffs'
11 claims, raising common questions of fact in rebutting Plaintiffs' claims about the nature
12 and scope of the problem the Act addresses, countering Plaintiffs' assertions that the Act
13 itself, not the discriminatory killing of unborn children because of their father's race, is
14 the problem. Defendant-Intervenors would therefore provide this Court a perspective it
15 might not otherwise hear about the basis for this legislation that might aid the Court in the
16 disposition of this case.

17 Thus, should the Court not grant Defendant-Intervenors' motion for intervention as
18 of right, Defendant-Intervenors respectfully request that the Court exercise its discretion
19 to grant them permissive intervention pursuant to Fed. R. Civ. P. 24(b).

20 CONCLUSION

21 For the foregoing reasons, the Court should grant the Defendant-Intervenors'
22 motion to intervene as of right, or in the alternative grant the Defendant-Intervenors'
23 motion for permissive intervention.

24 **RESPECTFULLY SUBMITTED** this 1st day of July 2013.

25 WILLIAM G. MONTGOMERY
26 MARICOPA COUNTY ATTORNEY

27 BY: /s/ Douglas L. Irish
28 William G. Montgomery
Douglas L. Irish

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

J. Kenneth Mangum
Louis F. Comus III
*Attorneys for proposed Defendant-Intervenor
William G. (Bill) Montgomery*

ALLIANCE DEFENDING FREEDOM

BY: /s/ Michael Casey Mattox
Michael Casey Mattox

BY: /s/ Jeremy D. Tedesco
Jeremy D. Tedesco
*Attorneys for proposed Defendant-Intervenors
Representative Steve Montenegro and the
Frederick Douglass Foundation*

1 ORIGINAL of the foregoing **E-FILED**
2 this 1st day of July 2013 with
3 automatically generated **E-COPIES** to:

4 Honorable Paul G. Rosenblatt
5 United States District Court
6 Sandra Day O'Connor U.S. Courthouse, Suite 523
7 401 West Washington Street, SPC 51,
8 Phoenix, Arizona 85003-2154

9 Daniel J. Pochoda (SBA 021979)
10 Kelly J. Flood (SBA 019772)
11 ACLU FOUNDATION OF ARIZONA
12 3707 North 7th Street, Suite 235
13 Phoenix, Arizona 85014
14 dpochoda@acluaz.org
15 kflood@acluaz.org

16 Susan Talcott Camp
17 Alexa Kolbi-Molinas
18 American Civil Liberties Union Foundation
19 125 Broad Street, 18th Floor
20 New York, New York 10004
21 akolbi-molinas@aclu.org
22 tcamp@aclu.org
23 *Attorneys for Plaintiffs*

24 Robert Ellman
25 Solicitor General
26 1275 West Washington
27 Phoenix, Arizona 85007
28 (602) 542-8986
Robert.Ellman@azag.gov
*Attorney for Tom Horne, Attorney General
And Lisa Wynn, Exec. Dir. Ariz. Medical Bd.
Defendants*

29 /s/ Lea L. Wink

30 S:\COUNSEL\Civil\Matters\GN\2013\NAACP v. Horne GN13-0213\Pleadings\Motion2Intervene 7-1-13.docx

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2013, a copy of foregoing Motion to Intervene, together with all attachments thereto, were filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Lea J. Wink
222 North Central Avenue, #1100
Phoenix, Arizona 85004
(P): 602 506-8541
(F): 602 506-8567

1 WILLIAM G. MONTGOMERY
MARICOPA COUNTY ATTORNEY
2 By: William G. Montgomery (021246)
Montgomw@mcao.maricopa.gov
3 Douglas L. Irish (002288)
Irishd@mcao.maricopa.gov
4 J. Kenneth Mangum (003077)
mangumk@mcao.maricopa.gov
5 Louis F. Comus III (020413)
Comusl@mcao.maricopa.gov
6 222 North Central Avenue, Suite 1100
Phoenix, Arizona 85004
7 Telephone (602) 506-8541
Facsimile (602) 506-8567
8 MCAO Firm No. 00032000

9 ALLIANCE DEFENDING FREEDOM
Michael Casey Mattox*
10 cmattox@alliancedefendingfreedom.org
11 801 G Street NW, Suite 509
Washington, DC 20001
12 Telephone: (202) 393-8690
13 Facsimile: (480) 347-3622

14 Jeremy D. Tedesco (023497)
jtedesco@alliancedefendingfreedom.org
15 15100 North 90th Street
Scottsdale, Arizona 85260
16 Telephone (480) 444-0020
Facsimile (480) 444-0028
17

18 Attorneys for Defendant-Intervenors for intervention
*Application for admission *pro hac vice* forthcoming

19
20 **IN THE UNITED STATES DISTRICT COURT**
21 **FOR THE DISTRICT OF ARIZONA**

22 National Association for the
Advancement of Colored People,
23 Maricopa County Branch, National
Asian Pacific American Women's
24 Forum,

25 Plaintiff,

26 v.

27 Tom Horne, Attorney General of
Arizona, in his official capacity; Arizona
28 Medical Board; and Lisa Wynn,

No. 2:13-cv-01079-PGR

EXHIBIT "A"

**(PROPOSED ANSWER
TO COMPLAINT)**

1 Executive Director of the Arizona
2 Medical Board, in her official capacity,

3 Defendants.

4 and

5 William G. Montgomery, Maricopa
6 County Attorney, in his official capacity;
7 Representative Steve Montenegro, in his
8 official capacity; and Frederick Douglass
9 Foundation,

10 Defendant-Intervenors

11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**PROPOSED ANSWER TO COMPLAINT
OF DEFENDANT INTERVENORS**

Come now Proposed Defendant-Intervenors William G. “Bill” Montgomery, Representative Steve Montenegro, and the Frederick Douglass Foundation, and for their answer to the Complaint, admit, deny and allege as follows:

PRELIMINARY STATEMENT

The Preliminary Statement is superfluous to the Complaint. However, Ariz. Rev. Stat. Ann. §§ 13-3603.02 and 36-2157 protect the unborn children of Arizona from racial and sexual discrimination and the statutes are thus consistent with, supported by and in conformity with the Fourteenth Amendment to the United States Constitution.

PARTIES
Parties

1. Lack sufficient information to form a belief as to the allegations in paragraph 1 of the Complaint, and therefore deny the same.
2. Lack sufficient information to form a belief as to the allegations in paragraph 2 of the Complaint, and therefore deny the same.
3. Lack sufficient information to form a belief as to the allegations in paragraph 3 of the Complaint, and therefore deny the same.
4. Lack sufficient information to form a belief as to the allegations in paragraph 4 of the Complaint, and therefore deny the same.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

21. As to paragraph 21, the Act speaks for itself.

22. Deny the allegations of paragraph 22.

23. As to paragraph 23, the Act speaks for itself, but deny the implication that relief would not be available pursuant to other law.

24. As to paragraph 24, the Act speaks for itself.

Legislative History and Intent

25. Admit the allegations of the first sentence of paragraph 25. Admit that the Act requires that a doctor who performs an abortion complete an affidavit, which is to be retained in the doctor’s file, but deny the allegation regarding the substance of said affidavit.

26. Deny the allegations of paragraph 26.

27. Lack sufficient information to form a belief as to the sweepingly-broad and vague allegations in paragraph 27 of the Complaint, and therefore deny the same.

28. Deny the allegations of paragraph 28.

Ban on Race-Selection Abortion

29. Deny the incomplete, out-of-context, and misrepresented allegations of paragraph 29.

30. Deny the incomplete, out-of-context, and misrepresented allegations of paragraph 30.

31. Deny the incomplete, out-of-context, and misrepresented allegations of paragraph 31.

32. Deny the incomplete, out-of-context, and misrepresented allegations of paragraph 32.

33. Deny the allegations of paragraph 33.

34. Defendant-Intervenors admit that some abortionists target minority communities and that there is historical evidence demonstrating the discriminatory intention of targeting those communities. Otherwise deny the allegations of paragraph 34.

35. Deny the allegations of paragraph 35.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

36. Deny the allegations of paragraph 36.

37. Deny the allegations of paragraph 37.

38. Lack sufficient information to form a belief as to the allegations in paragraph 38 of the Complaint, and therefore deny the same.

39. Deny that the Act necessarily considers the race of the pregnant woman who decides to obtain abortion care (or her partner) and admit that the Act protects the embryos and fetuses of “minority” (and, actually, all) women from being “targeted for abortion” for purposes of gender or ethnic discrimination.

40. Admit.

Ban on Sex-Selection Abortion

41. Admit that the Act imposes requirements and sanctions on sex-selection abortions. Lack sufficient information to form a belief as to the remaining allegations in paragraph 41 and therefore deny the same.

42. Upon information and belief, admit the allegations in paragraph 42.

43. Lack sufficient information to form a belief as to the allegations in paragraph 43 and therefore deny the same.

44. Deny the allegations of paragraph 44.

45. Deny the allegations of paragraph 45.

46. Lack sufficient information to form a belief as to the allegations in paragraph 46 and therefore deny the same.

47. Deny the allegations of paragraph 47.

48. Deny the allegations of paragraph 48.

49. Deny the allegations of paragraph 49.

50. Lack sufficient information to form a belief as to the allegations in paragraph 50 and therefore deny the same.

51. Lack sufficient information to form a belief as to the allegations in paragraph 51 and therefore deny the same.

1 **Impact of the Act**

2 52. Deny the allegations of paragraph 52.

3 53. Deny the allegations of paragraph 53.

4 54. Deny the allegations of paragraph 54.

5 55. Deny the allegations of paragraph 55.

6 56. Deny the allegations of paragraph 56.

7 57. Deny the allegations of paragraph 57.

8 **CAUSE FOR RELIEF: EQUAL PROTECTION**
9 **(Fourteenth Amendment)**

10 58. Admit that federal laws protect women and Blacks and Asian and Pacific
11 Islander persons, among other groups.

12 59. Deny the allegations in paragraph 59.

13 60. Deny the allegations in paragraph 60.

14 61. Deny the allegations in paragraph 61.

15 62. Deny the allegations in paragraph 62.

16 63. Deny the allegations in paragraph 63.

17 64. Deny all allegations not specifically admitted.

18 **AFFIRMATIVE DEFENSES**

19 65. Allege that the Complaint fails to state a claim for which relief can be
20 granted.

21 66. Allege that the Plaintiffs lack standing.

22 67. Allege that the Plaintiffs' claims are not ripe.

23 68. Allege that the Court lacks subject matter jurisdiction.

24 69. Allege that Plaintiffs lack standing to seek the relief requested.

25 70. Allege that the provisions of the statute are race and gender neutral and do
26 not violate the Fourteenth Amendment of the U.S. Constitution or any other provisions of
27 the U.S. Constitution.

28 71. Allege that the people of Arizona through their legislature and government
have the right and the duty to enact laws that protect all citizens, born and unborn, from

1 invidious discrimination based on race or gender.

2 Wherefore, having fully answered Plaintiffs' Complaint, Intervening Defendants
3 pray that this Court:

4 A. Dismiss Plaintiffs' Complaint and order that Plaintiffs take nothing thereby;

5 B. Grant Intervening Defendants their costs incurred and reasonable attorneys'
6 fees, if appropriate.

7 C. Enter judgment in favor of Intervening Defendants; and

8 D. Grant such other relief as this Court deems just and appropriate.

9 **RESPECTFULLY SUBMITTED** this `1st day of July 2013.

10 WILLIAM G. MONTGOMERY
11 MARICOPA COUNTY ATTORNEY

12 BY: /s/ Douglas L. Irish

13 William G. Montgomery

14 Douglas L. Irish

15 J. Kenneth Mangum

16 Louis F. Comus III

Attorneys for proposed Defendant-Intervenor

William G. (Bill) Montgomery

17 ALLIANCE DEFENDING FREEDOM

18 BY: /s/ Michael Casey Mattox

19 Michael Casey Mattox

20 BY: /s/ Jeremy D. Tedesco

21 Jeremy D. Tedesco

22 *Attorneys for proposed Defendant-Intervenors*

23 *Representative Steve Montenegro and the*

24 *Frederick Douglass Foundation*

1 ORIGINAL of the foregoing **E-FILED**
2 this 1st day of July 2013 with
3 automatically generated **E-COPIES** to:

4 Honorable Paul G. Rosenblatt
5 United States District Court
6 Sandra Day O'Connor U.S. Courthouse, Suite 523
7 401 West Washington Street, SPC 51,
8 Phoenix, Arizona 85003-2154

8 Daniel J. Pochoda (SBA 021979)
9 Kelly J. Flood (SBA 019772)
10 ACLU FOUNDATION OF ARIZONA
11 3707 North 7th Street, Suite 235
12 Phoenix, Arizona 85014
13 dpochoda@acluaz.org
14 kflood@acluaz.org

Susan Talcott Camp
Alexa Kolbi-Molinas
American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
akolbi-molinas@aclu.org
tcamp@aclu.org
Attorneys for Plaintiffs

13 Robert Ellman
14 Solicitor General
15 1275 West Washington
16 Phoenix, Arizona 85007
17 (602) 542-8986
18 Robert.Ellman@azag.gov
19 *Attorney for Tom Horne, Attorney General*
20 *And Lisa Wynn, Exec. Dir. Ariz. Medical Bd.*
21 *Defendants*

22
23
24
25
26
27
28

/s/ Lea J. Wink

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2013, a copy of foregoing Motion to Intervene, together with all attachments thereto, were filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Lea J. Wink
222 North Central Avenue #1100
Phoenix, Arizona 85004
(P): 602-372-6082
(F): 602-506-2181

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

National Association for the
Advancement of Colored People,
Maricopa County Branch, National
Asian Pacific American Women’s
Forum,

Plaintiff,

v.

Tom Horne, Attorney General of
Arizona, in his official capacity; Arizona
Medical Board; and Lisa Wynn,
Executive Director of the Arizona
Medical Board, in her official capacity,

Defendants.

and

William G. Montgomery, Maricopa
County Attorney, in his official capacity;
Representative Steve Montenegro, in his
official capacity; and Frederick Douglass
Foundation,

Defendant-Intervenors

No. 2:13-cv-01079-PGR

**(PROPOSED) ORDER GRANTING
MOTION TO INTERVENE**

(PROPOSED) ORDER GRANTING MOTION TO INTERVENE

On considering the motion of William G. Montgomery, in his official capacity as
Maricopa County Attorney, Representative Steve Montenegro, in his official capacity, and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

the Frederick Douglass Foundation, ("Movants") to intervene, the briefs and argument in support thereof and in opposition thereto, and the record herein, it is hereby

ORDERED that the Movants’ motion to intervene as of right is GRANTED; and it is

FURTHER ORDERED that the counsel for the parties confer and that, within ten business days of this Order, Movants file a proposed scheduling order for further proceedings consistent with this Order.

DATED: This _____ day of _____, 2013.

Judge