No. 23-235

# In the Supreme Court of the United States

U.S. FOOD & DRUG ADMINISTRATION, ET AL.,
*Petitioners,*

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE, ET AL.,
*Respondents.*

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## AMICUS CURIAE BRIEF OF AANHPI, BLACK, AND IMMIGRANT WOMEN'S ORGANIZATIONS IN SUPPORT OF PETITIONERS


NIYATI SHAH
*Counsel of Record*
NOAH BARON
SHALAKA PHADNIS
ASIAN AMERICANS ADVANCING JUSTICE | AAJC
1620 L Street NW, Suite 1050
Washington, DC 20036
(202) 296-2399
nshah@advancingjustice-aajc.org



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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are national, nonprofit organizations serving and advocating for the rights of AANHPI, Black, and immigrant communities, with a focus on women and girls.

National Asian Pacific American Women's Forum ("NAPAWF") is the only national nonprofit organization for AANHPI women and girls in the United States. NAPAWF seeks to build the collective power of AANHPI women and girls so they can have full agency of their lives, families, and communities. NAPAWF works to create social, political, and economic change for all AANHPI women and girls, including in the areas of reproductive health and rights, economic justice, and immigrants' rights. NAPAWF's work is explicitly guided through a reproductive justice lens, rooted in each person's unique intersecting identities.

Asian Americans Advancing Justice | AAJC ("Advancing Justice-AAJC") is a nonprofit, nonpartisan organization that seeks to create an equitable society for all. Advancing Justice-AAJC works to further civil and human rights and empower Asian American communities through organization, education, advocacy, and litigation. Advancing

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their members, or their counsel made a monetary contribution to this brief's preparation or submission.

Justice-AAJC is a leading expert on issues of importance to the Asian American community, including voting, census, educational equity, immigrant rights, and anti-racial profiling.

In Our Own Voice: National Black Women's Reproductive Justice Agenda is a national-state partnership focused on lifting up the voices of Black women leaders at the national and regional levels in our fight to secure Reproductive Justice for all women, girls, and gender-expansive individuals.

An additional eight *amici* organizations are listed in the appendix as signatories to this brief. These organizations advocate for civil and human rights, specifically reproductive justice and support for immigrant women and girls and women of color.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The outcome of this case will determine whether many women of color[2] can access abortion at all. Medication abortion accounts for more than half of all abortions performed in the United States, and in 2020, virtually all of them used a regimen of mifepristone and misoprostol. Women of color, who are far more likely to have abortions as compared to white women, are especially reliant on medication abortion in light of disproportionate economic, language, and legal barriers to accessing surgical abortion – barriers which will be compounded by the hurdles to mifepristone that Respondents seek to reinstate.

Women of color have unique concerns, experience unique benefits of medication abortion, and suffer disproportionate impacts from lack of access to sexual and reproductive healthcare services broadly, including medication abortion.

Medication abortion – mifepristone, in particular – saves the lives of thousands of women of color in the United States. The women who use it also experience

[2] *Amici* use the term "women of color" to refer to Black, Latina, Asian American, Native Hawaiian, Pacific Islander (the latter three groups collectively referenced herein as "AANHPI" or "AAPI"), and other Indigenous subgroups of racialized women. When referring to women of color, *amici* understand and acknowledge that transgender and non-binary child-bearing individuals from these groups also rely on abortion care, and may be similarly harmed or prejudiced, and equally benefitted by the challenged regulations.

the benefits it provides in increased economic security and financial wellbeing, as well as better physical and mental health. Women of color are differently situated from white women when it comes to educational resources, financial wellbeing, cultural attitudes, and health outcomes, both generally and specifically during pregnancy. Ready access to a safe, reliable, and effective method of medication abortion directly impacts their ability to advance in all these areas.

For immigrant women of color, their experiences both reflect the lives of women of color and demonstrate the unique role of mifepristone in their journeys toward secure immigration status, economic self-sufficiency, and healing from traumatic violence.

Even with the myriad benefits, access to mifepristone remains a challenge for women of color for various economic, linguistic, and cultural reasons. That is why the Food and Drug Administration's (FDA) decision to remove the in-person dispensing requirement has eased the burden on women of color to find and obtain mifepristone, and therefore, to access abortion care at all. If the Court finds that the FDA's decision was arbitrary and capricious, the consequences will be devasting for women of color in the United States. The barriers that they continue to face in accessing a safe, reliable, and effective abortion of any kind will prove insurmountable to many, resulting in women of color being forced to carry their pregnancies to term, and causing radiating harm to them, their families, and their communities.

## ARGUMENT

Medication abortion is often outcome determinative of whether women of color can access abortion at all, even in the 36 states where abortion is legal or legal with gestational limits of six to 18 weeks.[3] Medication abortion accounts for 53 percent – the majority – of all abortions performed in the United States.[4] In 2020, 98 percent of medication abortions "used a regimen of mifepristone and misoprostol."[5] Moreover, women of color have a particularly significant stake in this matter, as "[m]ost people who have abortions are not white" – even when controlling for income – by substantial margins:[6] "In 2019, the abortion rate was 23.8 per 1,000 Black women, 11.7 per 1,000 Hispanic women, 13 per 1,000 Asian American, Native American, and other women – and just 6.6 per 1,000 White women,

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[3] Annette Choi & Devan Cole, *See where abortions are banned and legal – and where it's still in limbo*, CNN.COM (Oct. 30, 2023), https://www.cnn.com/2022/08/31/us/abortion-access-restrictions-bans-us/index.html.

[4] Rachel K. Jones et al., *Abortion incidence and service availability in the United States, 2020*, 54 PERSP. ON SEX & REPROD. HEALTH 128, 136 (2022), *available at* https://doi.org/10.1363/psrh.12215.

[5] Jesse Philbin et al., *10 U.S. States Would Be Hit Especially Hard by a Nationwide Ban on medication Abortion Using Mifepristone*, GUTTMACHER INST. (2023), https://www.guttmacher.org/2023/02/10-us-states-would-be-hit-especially-hard-nationwide-ban-medication-abortion-using.

[6] Susan A. Cohen, *Abortion and Women of Color: The Bigger Picture*, GUTTMACHER INST. (Aug. 6, 2008), https://www.guttmacher.org/gpr/2008/08/abortion-and-women-color-bigger-picture.

according to data reported to the Centers for Disease Control and Prevention (CDC)."[7]

## I. MEDICATION ABORTION IS OFTEN THE ONLY ACCESS TO ABORTION AVAILABLE TO WOMEN OF COLOR

For women of color seeking an abortion, their choice is often between medication abortion or none at all.[8] As of April 2023, 14 percent of people in the country live "more than 200 miles from the nearest abortion facility, and the average American is 86 miles from a provider."[9] These statistics are the product not only of state laws but "a lack of health care practitioner training, institutional policies against abortion provision, and a restricted pool of

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[7] Zara Abrams, *Abortion bans cause outsized harms for people of color*, AM. PSYCHIATRIC ASS'N. (Apr. 14, 2023), https://www.apa.org/monitor/2023/06/abortion-bans-harm-people-of-color.

[8] The barriers that women of color face in accessing surgical abortion are myriad and well documented. *See, e.g.*, Samantha Artiga et al., *What are the Implications of the Overturning of* Roe v. Wade *for Racial Disparities?*, KAISER FAM. FOUND. (July 15, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-roe-v-wade-for-racial-disparities/.

[9] Selena Simmons-Duffin & Shelly Cheng, *How many miles do you have to travel to get abortion care? One professor maps it*, NAT'L PUBLIC RADIO (June 21, 2023), https://www.npr.org/sections/health-shots/2023/06/21/1183248911/abortion-access-distance-to-care-travel-miles.

health professionals qualified and willing to provide abortion care."[10]

Women of color face a variety of hurdles in making the lengthy journey necessary to obtain a surgical abortion. For example, they are more likely to be poor and, therefore, less likely to be able to afford significant travel to obtain a surgical abortion.[11] As the Court observed in *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020), the "burdens of . . . increased travel . . . fall disproportionately on poor women, who are least able to absorb them." *Id.* at 2130. In addition, AANHPI women in one study "recounted barriers to abortion care that have been documented in previous research" such as high costs, lack of insurance coverage, and limited appointment availability.[12]

There are also legal barriers, particularly for immigrant women of color. In Texas, one Planned Parenthood patient was unable to travel "more than 70 miles or would risk jeopardizing both her ability to

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[10] Committee on Health Care for Underserved Women, PRACTICE ADVISORY: INCREASING ACCESS TO ABORTION, AM. COLL. OF OBSTET. & GYNECOL. (Dec. 2020), *available at* https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2020/12/increasing-access-to-abortion.

[11] *See infra*, Part III.

[12] National Asian Pacific American Women's Forum, MEDICATION ABORTION AMONG ASIAN AMERICANS, NATIVE HAWAIIANS, AND PACIFIC ISLANDERS 10 (May 2023) (hereinafter "NAPAWF Report"), *available at* https://napawf.org/resources/medication-abortion-aanhpi-study/.

remain in the country and the security of her two children."[13] Moreover, only 19 states and the District of Columbia have enacted laws permitting undocumented immigrants to obtain driver's licenses,[14] which can limit immigrant women's ability to travel and access abortion care. These barriers can result in serious consequences, as illustrated by the fact that "foreign-born . . . women are less likely to receive [sexual and reproductive health]-related cancer screenings than their U.S.-born counterparts."[15]

Women of color are also unable to access surgical abortion for many other reasons beyond travel, including the rising costs of the procedure itself,[16] inequitable access to paid leave,[17] and cultural

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[13] Amanda Su, *Challenges increase for immigrants accessing abortion after Roe reversal*, ABC NEWS (July 17, 2022, 7:00 AM), https://abcnews.go.com/US/challenges-increase-immigrants-accessing-abortion-roe-reversal/story?id=86404717.

[14] *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 13, 2023), https://www.ncsl.org/immigration/states-offering-drivers-licenses-to-immigrants.

[15] Athena Tapales, et al., *The sexual and reproductive health of foreign-born women in the United States*, 98(1) CONTRACEPTION 47 (Feb. 15, 2018), https://www.contraceptionjournal.org/action/showPdf?pii=S0010-7824%2818%2930065-9.

[16] Ushma D. Upadhyay et al., *Trends In Self-Pay Charges And Insurance Acceptance For Abortion In The United States, 2017-20*, 41(4) HEALTH AFF. 507, 508 (Apr. 2022), https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2021.01528.

[17] *See infra*, Part III.

stigma.[18] Moreover, huge proportions of women of color – including "nearly half (49%) of all [American Indian and Alaska Native] women ages 18-49" and 28 percent of Latina and Black women in that age group – live in states that have prohibited abortion.[19]

Finally, many women of color prefer medication abortion to surgical abortion for cultural and personal reasons. A 2021 study found that "Asian women were more than twice as likely to choose medication abortion over other methods since they felt it was safer."[20] Their ability to follow through with their chosen method of abortion has important implications for uplifting these women's self-esteem and sense of safety and autonomy.

These circumstances underscore the importance of the challenged regulations, which ease some of the inequities that have prevented women of color from accessing abortion.

## II. ACCESS TO MIFEPRISTONE IS LIFESAVING FOR WOMEN OF COLOR

Mifepristone, upon which women of color rely to access abortion, provides several concrete, critical benefits to the economic security and physical and psychological health of women of color, including immigrant women of color. The challenged

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[18] *See infra*, Part III at 16-18.

[19] Artiga et al., *supra* note 8.

[20] NAPAWF Report, *supra* note 12, at 2 (citation omitted).

regulations are crucial for women of color to continue to receive these benefits and must remain in place.

### a. Impact on Economic Security

Adequate access to the most common form of abortion in the United States has a direct impact on the economic security and financial well-being of women of color, increasing their labor force participation and education attainment, and thereby reducing poverty for them and their families. Black women, in particular, increased their participation in the labor force by 6.9 percentage points as a result of increased abortion access compared with two percentage points for white women.[21] As a 2021 study synthesizing "66 articles containing data on the macroeconomic impacts of abortion care services and policies" found, "[a]bortion regulations have spillover effects on women's educational attainment and labor supply."[22] Specifically, research demonstrates "substantial increases in high school graduation, college attendance…employment," and "labor force participation rates" for Black women, and single Black women in particular.[23] These effects are critical

[21] Anne Bernstein & Kelly M. Jones, *The Economic Effects of Abortion Access: A Review of the Evidence*, INST. FOR WOMEN'S POLICY RSCH., CTR. ON THE ECON. OF REPROD. HEALTH (July 2019), https://iwpr.org/wp-content/uploads/2020/07/B379_Abortion-Access_rfinal.pdf.

[22] Yana van der Meulen Rodgers et al., *The macroeconomics of abortion: A scoping review and analysis of the costs and outcomes*, 16(5) PLoS ONE (May 6, 2021), *available at* https://doi.org/10.1371/journal.pone.0250692.

[23] *Id.*

for women of color, who endure higher rates of poverty even though "the majority of women of color participate in the labor force," with rates above 55 percent for Black women, Asian women, and Latinas.[24]

Higher rates of poverty are at least partially attributable to the gender wage gap, a serious barrier to the ability of women of color and their communities to build wealth and ensure generational security. Women of color make between 54 cents (Latinas) to 85 cents (Asian American women) on the dollar compared to their "white, non-Hispanic male counterparts."[25] And disaggregated data show that differences within racial groups are even more stark: "AAPI women earn roughly 81 cents to an Asian man's dollar . . . Indian women only earn 73 cents to an Indian man's dollar," and "Southeast Asian and Pacific Islander women have some of the highest wage gaps compared to other racial and ethnic groups."[26]

In this context, access to reproductive health allows women of color to make their own decisions about their participation in the workforce by giving them control over their family-planning decisions,[27]

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[24] Intersections of Our Lives, *Women of Color and Economic Policy* (October 2017), https://intersectionsofourlives.org/wp-content/uploads/2019/03/Women-of-Color-and-Economic-Policy.pdf.

[25] *Id.*

[26] *Id.*

[27] Bernstein & Jones, *supra* note 21.

and self-determination in prioritizing family, work, or education.

Women of color are acutely aware of these realities. Indeed, 80 percent of women of color voters "see societal and personal benefits to women having control over reproductive decisions."[28] Women of color broadly believe that control over their own reproductive decisions increases economic opportunities, provides greater financial security, and increases educational opportunities.[29] These beliefs have only strengthened over the years, as "AAPI women are most likely to see a wide variety of benefits. . . . Black women are more likely to say having control leads to higher educational attainment than in 2019," and "Latinas also ranked having control over decisions about their bodies higher this cycle."[30]

These concrete economic and health benefits demonstrate that access to medication abortion is not only about the autonomy of women of color over their own bodies; it translates into gains in their ability to participate in the labor force, and the financial gains they are able to make there.

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[28] The Harris Poll & Intersections of Our Lives, *Understanding the Priorities of Women of Color Voters* (July 2021), https://intersectionsofourlives.org/wp-content/uploads/2021/07/Intersections-Poll-Report-July-2021-PDF.pdf.

[29] *Id.*

[30] *Id.*

### b. Impact on Health, Including Maternal Health

Access to mifepristone is also essential to the broader health of women of color. As an initial matter, abortion is safe: "an abortion of any kind" – including medication abortion – is less dangerous than continuing a pregnancy.[31] In fact, "the risk of maternal mortality associated with full term pregnancy and delivery is about 14 times higher than the risk of interrupting a pregnancy with either a medical or surgical abortion," according to Dr. Deborah Bartz, "a gynecologist at Brigham and Women's in Boston." [32]

Furthermore, because pregnancy poses an even greater health risk to Black and Latina women as compared to their white counterparts, equitable abortion access is a key part of their ability to exercise autonomy over their own healthcare and health outcomes. Specifically, "Black women have the highest rates of maternal mortality in the country and are 2.6 times more likely to die from pregnancy- and childbirth-related causes compared to women of other races and ethnicities," because of "substandard care at hospitals, driven by anti-Black racism and

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[31] Nadine El Bawab, *This is how mifepristone and misoprostol induce abortions*, ABC NEWS (Aug. 18, 2022), https://abcnews.go.com/Health/mifepristone-misoprostol-induce-abortions/story?id=88490868

[32] *Id.*

discrimination."[33] Similarly, "[w]omen living in majority Hispanic communities also face severe complications 32% more often than those living in majority White communities."[34]

Research demonstrates that "[a]bortion legalization reduced maternal mortality among Black women by 30-40%."[35] Accordingly, "access to abortion care," as part of the continuum of "prenatal and post-partum care, and childcare," is critical for women of color, and especially Black women, to make decisions about their own health.[36]

The health benefits of mifepristone go well beyond the immediate effect of terminating a pregnancy. For instance, "[m]ifepristone has also been shown to decrease the size of uterine fibroids, which are noncancerous tumors that can cause pain."[37] Unfortunately, "Black women in their 20s are four times more likely than their white counterparts to

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[33] In Our Own Voice, *Reimagining Policy: In Pursuit of Black Reproductive Justice* 9 (2023), https://blackrj.org/wp-content/uploads/2023/06/RJPolicyAgenda2023.pdf.

[34] Abrams, *supra* note 7.

[35] Caitlin Knowles-Myers & Morgan Welch, *What can economic research tell us about the effect of abortion access on women's lives?*, BROOKINGS (Nov. 2021) (citing Sherajum Monira Farin, Lauren Hoehn & Michael Pesko, *The Impact of Legal Abortion Maternal Health: Looking to the Past to Inform the Present*, J. ECON. LITERATURE (2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3913899)).

[36] In Our Own Voice, *supra* note 33, at 15.

[37] Margo Snipe, *What's Missing From the 'Abortion Pill' Conversation*, CAPITAL B NEWS (Apr. 12, 2023) https://capitalbnews.org/abortion-pill-rulings/.

have them, and about 60% of Black women experience them by the age of 25."[38] Accordingly, safe and reliable mifepristone access has long-term implications for Black women's health.

#### c. Impact on Immigrant Women of Color

Immigrants are 17 percent of women of reproductive age in the United States;[39] Of immigrants seeking abortions, almost half (49 percent) were Latina and 20 percent were Asian.[40] Immigrants also make up significant portions of the population of AAPI, Latina, and Black women. "One-in-ten Black people in the U.S. are immigrants"[41]

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[38] *Id.* (citing Beata Mostafavi, *Understanding Racial Disparities for Women with Uterine Fibroids*, Michigan Medicine, UNIV. OF MICHIGAN (Aug. 12, 2020), https://www.michiganmedicine.org/health-lab/understanding-racial-disparities-women-uterine-fibroids).

[39] Sheila Desai, Ellie Leong, & Rachel K. Jones, *Characteristics of Immigrants Obtaining Abortions and Comparison with U.S.-Born Individuals*, J. WOMEN'S HEALTH (Nov 12, 2019), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6862954/.

[40] *Id.*

[41] Christine Tamir, *Key findings about Black immigrants in the U.S.*, PEW RESEARCH CENTER (Jan. 27, 2022), *available at* https://www.pewresearch.org/short-reads/2022/01/27/key-findings-about-black-immigrants-in-the-u-s/

while "[n]early two-thirds of AAPI are foreign-born."[42] Fifty-two percent of those Asian American immigrants and approximately 45 percent of foreign-born Pacific Islanders reported limited English proficiency ("LEP").[43] While most Latinxs in the U.S. are native born, "35 percent (19.5 million) were immigrants." Among Latinx immigrants, only 37 percent speak English proficiently as of 2019.[44]

There are multiple, overlapping reasons why mifepristone access has a strong, positive impact on the lives of immigrant women of color. These include their personal beliefs and desire for medication abortion access, impact on economic stability, and devastating experiences with detention and domestic violence.

After learning about medication abortion, "many [AANHPI] participants described it as preferable for themselves and their respective community."[45] One Korean survey respondent affirmed that she would "definitely choose medication" because "[y]ou can do it privately in your private room" and another

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[42] Asian Americans Advancing Justice, INSIDE THE NUMBERS: HOW IMMIGRATION SHAPES ASIAN AMERICAN AND PACIFIC ISLANDER COMMUNITIES 14 (June 12, 2019), *available at* https://www.advancingjustice-aajc.org/inside-the-numbers-report-2019.

[43] *Id.*

[44] Cary Funk & Mark Hugo Lopez, *A brief statistical portrait of U.S. Hispanics*, PEW RESEARCH CENTER (June 14, 2022), *available at* https://www.pewresearch.org/science/2022/06/14/a-brief-statistical-portrait-of-u-s-hispanics.

[45] NAPAWF Report, *supra* note 12, at 10.

Taiwanese respondent shared that she was "very relieved" to find out medication abortion was an option.[46]

Mifepristone's economic benefits are even more pronounced for immigrant women of color. Compounding the existing gender wage gap for women of color, immigrant women "still earn less in the labor force than any other demographic."[47] Being able to take mifepristone reliably, comfortably, and without traveling long distances minimizes the disruption to immigrant women's participation in the labor force and their ability to provide for their families.

Immigrant women and girls in the United States are, tragically, "twice as likely to experience domestic violence than the general population" due to factors including LEP, separation from family, "extreme inequality, [and] fear and distrust" of authority figures.[48] Both within their own communities and in society broadly, immigrant women often face patriarchal attitudes and beliefs about a woman's role and right to seek an abortion for herself. This

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[46] *Id.* at 9, 10.

[47] Intersections of Our Lives, *Women of Color and Immigration* 2 (October 2017), *available at* https://intersectionsofourlives.org/wp-content/uploads/2019/03/Women-of-Color-and-Immigration.pdf.

[48] Tahirih Justice Center, *A Global Epidemic*, https://www.tahirih.org/who-we-serve/forms-of-violence/ (last visited Jan. 26, 2024).

increases the mental and practical burden on immigrant women to find safe, understanding support systems and post-abortion care, as well as educate their own families and communities on their attitudes to abortion.[49] This fear and lack of support makes it even more important for immigrant women of color to have access to reproductive healthcare in a private setting with people they choose.

For survivors of domestic or sexual violence, access to medication abortion can also be a critical part of their healing journey and ability to reclaim autonomy over their lives and bodies. "Being forced to carry pregnancies to term can be mentally and physically traumatizing to people who experience violence and push them and their children into unsafe situations."[50] This is not only a health impact but can worsen immigrant survivors' precarious living and financial situations. "Controlling women through impregnation and threatening a woman with abandonment during her pregnancy are well-

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[49] *See e.g.* Lizzie Widdicombe, *A Reproductive-Rights Activist Explains the Realities of Abortion for Latina Women*, NEW YORKER MAGAZINE (Jan. 26, 2022) (describing challenging beliefs about abortion in her own family), *available at* https://www.newyorker.com/news/as-told-to/a-reproductive-rights-activist-explains-the-realities-of-abortion-for-latina-women.

[50] Tahirih Justice Center, *Statement from Archi Pyati, Tahirih Justice Center CEO on* Dobbs v. Jackson Women's Health Organization *Ruling* (Jun. 24, 2022), https://www.tahirih.org/news/statement-from-archi-pyati-tahirih-justice-center-ceo-on-dobbs-v-jackson-womens-health-organization-ruling/.

documented tactics of abuse and control."[51] Between this Court's decision in *Dobbs v. Jackson Women's Health Organizations* in June 2022, and January 1, 2024, approximately 64,000 pregnancies have resulted from rape in states with abortion bans.[52] When survivors are not able to access abortion, the traumatic loss of autonomy from rape is compounded, as they are forced to carry to term pregnancies that they did not choose.[53] Black, Latina and AAPI women, as with so many other instances of violence in American society, disproportionately bear the brunt

[51] *Id.*; *see also* U.S. Dep't. of Health & Hum. Serv. Off. on Women's Health, *Signs of domestic violence or abuse* , https://www.womenshealth.gov/relationships-and-safety/domestic-violence/signs-domestic-violence#1 (last visited Jan. 28, 2024).

[52] This number is likely an undercount because "[h]ighly stigmatized life events are hard to measure. And many survivors of sexual violence do not want to disclose that they went through this incredibly stigmatizing traumatic life event." Tanya Lewis, *64,000 Pregnancies Caused by Rape Have Occurred in States with a Total Abortion Ban, New Study Estimates*, SCIENTIFIC AM. (Jan. 25, 2024), *available at* https://www.scientificamerican.com/article/64-000-pregnancies-caused-by-rape-have-occurred-in-states-with-a-total-abortion-ban-new-study-estimates/.

[53] *See, e.g.*, Selena Simmons-Duffin, *Raped, pregnant and in an abortion ban state? Researchers gauge how often it happens*, NAT'L PUBLIC RADIO (Jan. 24, 2024), https://www.npr.org/sections/health-shots/2024/01/24/1226161416/rape-caused-pregnancy-abortion-ban-states (a survivor explaining how "having the ability to make that choice" after her rape "was so, so pivotal to [her] healing.").

of sexual violence and its related pregnancy consequences.[54]

There is a clear intersection between domestic violence and sexual assault specific to immigrant women and the condition of immigration detention. "Sexual assault in immigration detention is a pervasive problem," with at least 1,016 incidents reported between May 2014 and July 2016.[55] Restoring survivors' agency after these traumatic experiences is critical, especially because they have already suffered loss of autonomy in detention in addition to assault.[56] Mifepristone access ensures that immigrant women can begin to heal post-

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[54] *See, e.g.*, Jameta Nicole Barlow, *Black women, the forgotten survivors of sexual assault*, AM. PSYCHIATRIC ASS'N (Feb. 1, 2020), *available at* https://www.apa.org/topics/sexual-assault-harassment/black-women-sexual-violence; Off. for Victims of Crime, Off. of Just. Programs, U.S. Dep't. of Just., *Latinas & Sexual Violence*, https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/existeayuda/tools/pdf/factsheet_eng.pdf; Yuying Tsong & Sarah E. Ullman, *Asian American Women Sexual Assault Survivors' Choice of Coping Strategies: The Role of Post-Assault Cognitive Responses*, 41 WOMEN & THERAPY 298 (Feb. 2018), *available at* https://www.tandfonline.com/doi/full/10.1080/02703149.2018.1430340.

[55] Intersections of Our Lives, *supra* note 47, at 3.

[56] Ashley Lopez, *How the Texas ban on abortions is harming survivors of rape and incest*, NAT'L PUBLIC RADIO (2021) (describing how survivors being forced to carry a pregnancy to term "further strips away agency…after their sense of safety and control has already been violated."), https://www.npr.org/sections/health-shots/2021/11/15/1054710917/texas-abortion-law-harm-sexual-assault-survivors

detention and make the best choice for their particular family, economic situation, and status.

Even outside that context, more immigrant women have spoken about reclaiming their autonomy through reproductive justice and by sharing their experiences with abortion.[57] The benefits of ready access to medication abortion uplift and strengthen immigrant women of color to advocate for themselves and continue to live full, rewarding lives.

## III. REINSTATING THE IN-PERSON DISPENSING REQUIREMENT WILL EXACERBATE THE SIGNIFICANT BARRIERS WOMEN OF COLOR FACE IN OBTAINING REPRODUCTIVE HEALTHCARE

Because women of color are especially reliant on medication abortion, for them access to medication abortion *is* access to abortion.[58] The challenged regulations made important changes that, against the backdrop of socioeconomic disparities and cultural differences affecting women of color, eased access to mifepristone.

Reinstating the prior regime will interact with pre-existing inequities women of color face, denying

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[57] *See*, *e.g.*, Brea Baker, *Women of Color Speak Out Against the Whitewashing of Reproductive Justice*, ELLE (July 9, 2020), https://www.elle.com/culture/career-politics/a33251077/intersectional-reproductive-justice-movement/.

[58] *See supra*, Part I.

them mifepristone and, ultimately, the abortion care they need.[59]

For example, many subgroups of women of color have LEP and therefore may struggle to communicate their care needs in person.[60] Of the LEP population, 62 percent are Latina, 22 percent are Asian, and 4 percent are Black; only 11 percent are white.[61] Furthermore, 28 percent of Latinx and 31 percent of Asian individuals are LEP, compared with only 2 percent of white individuals.[62]

Without the ability to clearly and comfortably communicate in English, women of color with LEP are hesitant to "discuss medical problems with a physician or nurse," "complete an insurance application[,] or decipher a medical bill."[63] LEP also

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[59] *See* Committee on Health Care for Underserved Women, *supra* note 10.

[60] Sweta Hadar et al., *Overview of Health Coverage and Care for Individuals with Limited English Proficiency (LEP)*, KAISER FAM. FOUND., (July 7, 2023), https://www.kff.org/racial-equity-and-health-policy/issue-brief/overview-of-health-coverage-and-care-for-individuals-with-limited-english-proficiency/.

[61] *Id.*

[62] *Id.*

[63] Leighton Ku, et al., *How Race/Ethnicity, Immigration Status and Language Affect Health Insurance Coverage, Access*

contributes to negative experiences in seeking information about healthcare – which means that the more complicated access is, the less likely LEP individuals are to obtain it. For example, one study on the "impact of language preference . . . on health information-seeking experiences" concluded that "Chinese-language was associated with frustration" and "[d]ifficulty understanding information was more likely in Spanish-language respondents[.]"[64]

Nor will in-person consultations with pharmacists address these problems. To the contrary, according to one study, "*[a]ll aspects of pharmaceutical care* were reported to be difficult to accomplish in patients with limited English proficiency," in part because "[m]any pharmacists (69%) were unaware of existing institutional policies for communicating with patients

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*to Care and Quality of Care Among the Low-Income Population* 4, KAISER COMM'N ON MEDICAID AND THE UNINSURED (Aug. 2003), *available at* https://www.kff.org/uninsured/report/how-raceethnicity-immigration-status-and-language-affect/; see also Quyen Ngo-Metzger, et al., *Linguistic and cultural barriers to care*, 18 J. OF GEN. INTERNAL MED. 1, 44-52 (2003) ("Cultural and linguistically appropriate health care services may lead to improved health care quality for Asian-American patients who have limited English language skills."), *available at* https://onlinelibrary.wiley.com/doi/full/10.1046/j.1525-1497.2003.20205.x.

[64] Janet N. Chu et al., *Impact of language preference and health literacy on health information-seeking experiences among a low-income, multilingual cohort*, 105 PATIENT EDUC. & COUNSELING 1268 (May 2022) (emphasis added), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9205365/.

with limited English proficiency."[65] Even where interpretation services were available, they were "nonstandardized and did not always reflect practitioners' practices."[66]

LEP women of color do not benefit from added requirements for accessing mifepristone. Even under the FDA's current risk evaluation and mitigation strategy regime, requiring a patient to understand and ask any necessary questions about a patient agreement form, LEP women struggle for all the reasons outlined above. Adding more required interactions with healthcare providers only serves to confound the process and make it harder for these women to access care, a barrier that, for many, may prove insuperable.

Disproportionate rates of poverty among women of color will also prevent them from accessing mifepristone should the Court force the FDA to alter its regulations. A 2019 report from the Kaiser Family Foundation assessing health inequities among low-income women concluded that "[p]overty, a shortage of affordable housing, and lack of education and employment opportunities leave many women . . .

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[65] Vinay Phokeo & Ilene Hyman, *Provision of pharmaceutical care to patients with limited English proficiency*, 64 AM. J. OF HEALTH-SYS. PHARM. 423 (Feb. 15, 2007) (emphasis added).

[66] *Id.*

with few resources to seek reproductive health services."[67]

Those same factors will disproportionately preclude women of color from accessing mifepristone if access becomes more complex. For example, prior to the 2021 FDA regulation, one study concluded that "increased costs and visits likely contributed to declines [in obtaining a medication abortion] among black women and women with lower levels of education."[68]

Indeed, racial minorities in the United States are disproportionately poorer, and more likely to live in poverty, as compared to their white counterparts. As of 2019, 18.8 percent of Black Americans and 15.7 percent of Latinx Americans lived under the poverty line, compared to only 7.3 percent of white

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[67] Usha Ranji et al., *Beyond the Numbers: Access to Reproductive Health Care for Low-Income Women in Five Communities*, KAISER FAM. FOUND. (Nov. 14, 2019), https://www.kff.org/report-section/beyond-the-numbers-access-to-reproductive-health-care-for-low-income-women-in-five-communities-executive-summary/.

[68] Ushma D. Upadhyay, *Sociodemographic Characteristics of Women Able to Obtain Medication Abortion Before and After Ohio's Law Requiring Use of the Food and Drug Administration Protocol*, 2 HEALTH EQUITY 122 (2018), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6071907/ (charting data from January 2010 to January 2011 and February 2011 to October 2014).

Americans.[69] Furthermore, disaggregated data about Asian Americans reveals significant poverty rates within subgroups: for example, 26 percent of Hmong Americans and 20 percent of Bangladeshi Americans live in poverty.[70]

Poverty-related health disparities reflect racially disparate employment realities, under which requiring in-person appearances for mifepristone will prove especially burdensome. Women of color disproportionately work at low wage jobs that rarely offer paid time off or paid medical leave. According to the Department of Labor, only 61.4 percent of Black women and 49.9 percent of Latinas have access to paid leave.[71] Furthermore, an estimated 26.6 percent of working AAPI women are essential workers, and nearly half a million AAPI women work in service

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[69] John Creamer, *Poverty Rates for Blacks and Hispanics Reached Historic Lows in 2019: Inequalities Persist Despite Decline in Poverty For All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sept. 15, 2020), https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in-2019.html.

[70] Asian Pacific American Legal Center & Asian American Justice Center, A COMMUNITY OF CONTRASTS: ASIAN AMERICANS IN THE UNITED STATES: 2011, 36 (2011), *available at* http://www.advancingjustice.org/pdf/Community_of_Contrast.pdf.

[71] *Leave Access*, Women's Bureau, U.S. DEP'T OF LABOR, https://www.dol.gov/agencies/wb/data/leave-job-flexibilities/leave-access#Access-to-Leave (last visited Jan. 26, 2024).

industries, which typically offer low wages and rarely provide paid leave.[72]

As a result, requiring these women to appear in person to obtain mifepristone would force them to choose between forgoing the medication or taking *unpaid* leave, a reduction in their already-meager earnings that they can ill afford. Many would be unable to sacrifice their earnings: workers without paid sick leave are *three times* more likely to "forgo medical care for themselves" as compared to "working adults with paid sick leave benefits."[73]

Poverty also interferes with healthcare access – and would exacerbate difficulty accessing mifepristone if those seeking it must appear in person – because of the cost barriers to obtaining quality

[72] Robin Bleiweis, Center for American Progress, THE ECONOMIC STATUS OF ASIAN AMERICAN AND PACIFIC ISLANDER WOMEN 4 (2021) ("In 2019, more than 1.4 million AAPI women in the labor force worked in jobs that had median hourly earnings below $15 an hour."), *available at* https://www.americanprogress.org/article/economic-status-asian-american-pacific-islander-women/; *see also* Jasmine Tucker, *Fact Sheet: Asian American and Pacific Islander Women Lose $10,000 Annually to the Wage Gap*, NAT'L WOMEN'S L. CTR. (March 2021), https://nwlc.org/wp-content/uploads/2020/01/AAPI-EPD-2021-v1.pdf (finding that AAPI women are overrepresented in both the frontline and low-wage workforces).

[73] LeaAnne DeRigne et al., *Workers Without Paid Sick Leave Less Likely To Take Time Off For Illness Or Injury Compared To Those With Paid Sick Leave*, 35 HEALTH AFFAIRS 520 (Mar. 2020), *available at* https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2015.0965 (emphasis added).

healthcare, which are substantial and unequally difficult.

Women of color also disproportionately lack access to information necessary to obtain the care they need, compounding the harms of unnecessary complexity in obtaining medications like mifepristone. For example, participants in a study of AANHPI women reported that they "often felt lost about where to go and relied on online information," particularly in relation to sexual and reproductive health.[74]

When pregnant women of color do seek assistance from healthcare providers, they face undue scrutiny, assumptions about seeking an abortion, and inadequate medical care as a result. AAPI women suffer from debunked stereotypes that they deliberately pursue sex-selective abortion, a damaging myth that has resulted in the unfair prosecutions of Bei Bei Shuai, a Chinese immigrant, and Purvi Patel, an Indian American woman, under "feticide" laws.[75] Ms. Shuai was attempting suicide while in the midst of a major depressive episode,

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[74] NAPAWF Report, *supra* note 12, at 7.

[75] Miriam Yeung, *How Asian American Women Became the Target of Anti-Abortion Activism*, THE WASHINGTON POST (Nov. 4, 2015), https://www.washingtonpost.com/posteverything/wp/2015/11/04/how-asian-american-women-became-the-target-of-anti-abortion-activism/; *see also* Nimra Chowdhry et al., *Asian-American Women Treated Unfairly For Ending Pregnancies*, INDY STAR (June 5, 2016), *available at* https://www.indystar.com/story/opinion/readers/2016/06/05/asian-american-women-treated-unfairlyendingpregnancies/85454898/.

while Ms. Patel's sentence was overturned on appeal.[76] Black and Latina women are explicitly targeted by efforts to criminalize pregnancy outcomes, such as in the case of Brittany Watts, a Black woman in Ohio who was reported to police by hospital staff while suffering a miscarriage.[77] These cases demonstrate the pervasive racist and cultural barriers that women of color face in seeking all kinds of reproductive healthcare. The threat of unjust and biased prosecutions generates fear of seeking surgical abortions, forcing women of color to choose unreliable and unsafe, but more private alternatives. These examples underscore the importance safe, private methods of medication abortion for women of color with minimal barriers to access.

Rolling back the challenged regulations will create additional burdens in accessing reproductive healthcare for immigrant women due to their

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[76] Yeung, *supra* note 75; Chowdhry, *supra* note 75.

[77] Maria Sole Campinoti et al., *A woman who had a miscarriage is now charged with abusing a corpse as stricter abortion laws play out nationwide*, CNN.COM (Dec. 19, 2023), https://www.cnn.com/2023/12/19/us/brittany-watts-miscarriage-criminal-charge/index.html; *see also* Julie Carr Smyth, *A Black Ohio woman was criminally charged with a felony after a miscarriage. It shows the perils of pregnancy post-Roe*, AP NEWS (Dec. 16, 2023), *available at* https://apnews.com/article/ohio-miscarriage-prosecution-brittany-watts-b8090abfb5994b8a23457b80cf3f27ce.

uncertain status in the United States.[78] Many immigrants are hesitant to appear at "health care sites" – including pharmacies – because they "perceive the prospect of interrogation or arrest by immigration enforcement officers" nearby as "a realistic risk."[79] Because of those fears, a requirement that they appear in person to access mifepristone may operate for many to deprive them of access entirely.

The in-person requirement will also detrimentally intersect with pre-existing health disparities in immigrant communities to deprive immigrant women of access to mifepristone. Many have reported that they have "[n]o [u]sual [s]ource of [c]are [o]ther than [the] [e]mergency [r]oom" (38 percent of likely undocumented immigrants; 18 percent of lawfully present immigrants; 12 percent of naturalized citizens); have not visited a doctor in the past 12

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[78] *See, e.g.*, *Key Facts on Health Coverage of Immigrants*, KAISER FAM. FOUND. (Sept. 17, 2023) (discussing widespread fear and misinformation among immigrants about effects of using non-cash assistance programs, including healthcare programs), https://www.kff.org/racial-equity-and-health-policy/fact-sheet/key-facts-on-health-coverage-of-immigrants/ (last visited Jan. 28, 2024).

[79] Medha D. Makhlouf, *Health Care Sanctuaries*, 20 YALE J. OF HEALTH POL'Y L. & ETHICS 1, 7 & n.14 (2021), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915570; *see also* Abigail F. Kolker & Elayne J. Heisler, Congressional Research Service, *Immigrants' Access to Health Care* 24 (Dec. 21, 2022), *available at* https://crsreports.congress.gov/product/pdf/R/R47351 ("Studies have shown that fear of deportation or immigrant enforcement actions are a barrier to unauthorized immigrants' utilization of health care for which they may be eligible.")

months (37 percent of likely undocumented immigrants; 26 percent of lawfully present immigrants; 18 percent of naturalized citizens); or have "skipp[ed] or postpone[ed] care in the past 12 months" (31 percent of likely undocumented immigrants; 22 percent of lawfully present immigrants; 19 percent of naturalized citizens).[80]

## IV. CONCLUSION

For millions of women of color, access to mifepristone is crucial – often, the sole form of abortion available to them. The FDA regulations challenged here as "arbitrary" not only have a sound basis in scientific evidence but represent great strides toward health equity, contributing to economic and health benefits for women of color, and supporting immigrant women's journeys towards security. Rolling back those changes would therefore not only be contrary to longstanding precedent – it would deal a blow to women of color, who would, in effect, be unable to access necessary, safe, legal abortion care. Reinstating the in-person dispensing requirement, in particular, would interact with preexisting health care disparities driven by poverty, employment, and immigration status to create insurmountable barriers to care.

This Court should therefore reject Respondents' efforts to reverse the FDA's regulations and, with them, the ability of women of color to obtain the care they need. The challenge lacks basis in either fact or

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[80] KAISER FAM. FOUND., *supra* note 78.

law and would do untold harm to women of color throughout the United States.

Respectfully submitted,

NIYATI SHAH
*Counsel of Record*
NOAH BARON
SHALAKA PHADNIS
ASIAN AMERICANS ADVANCING
JUSTICE | AAJC
1620 L Street NW, Suite 1050
Washington, DC 20036
(202) 296-2399
nshah@advancingjustice-aajc.org

## TABLE OF APPENDICES

LIST OF ADDITIONAL *AMICI CURIAE* ....................................................................1a

## LIST OF ADDITIONAL *AMICI CURIAE*

1. Apna Ghar, Inc.
2. Asian/Pacific Islander Domestic Violence Resource Project
3. Daya, Inc.
4. Empowering Pacific Islander Communities (EPIC)
5. Jahajee Sisters
6. KAN-WIN
7. Laotian American National Alliance (LANA)
8. National Council of Asian Pacific Americans (NCAPA)