No. 20-5969

IN THE

United States Court of Appeals

FOR THE SIXTH CIRCUIT

MEMPHIS CENTER FOR REPRODUCTIVE HEALTH, *et al.*,

Plaintiffs-Appellees,

—v.—

HERBERT H. SLATERY, III, Attorney General of Tennessee, in his official capacity, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
Middle District of Tennessee, No. 3:20-cv-00501

BRIEF OF NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM, ASIAN AMERICANS ADVANCING JUSTICE, AND JAPANESE AMERICAN CITIZENS LEAGUE AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1, *amici curiae* National Asian Pacific Women's Forum, Asian Americans Advancing Justice, and Japanese American Citizens League state that they are 501(c)(3) non-profit organizations with no parent corporations or publicly traded stock.

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STATEMENT OF INTEREST

Amici Curiae National Asian Pacific American Women's Forum, Asian Americans Advancing Justice, and Japanese American Citizens League are 501(c)(3) non-profit organizations that work to advance social justice and human rights for Asian American and Pacific Islanders ("AAPI").[1]

"Reproductive justice" is rooted in the belief that all individuals and communities should have the economic, social, and political power and resources to make decisions about their bodies, health, sexuality, families, and communities in all areas of their lives with dignity and self-determination. Reproductive justice advances the human right to maintain personal bodily autonomy, have children, not have children, and parent the children one has in safe and sustainable communities. Centering on women of color and lesbian, gay, bisexual, transgender, and queer individuals, the reproductive justice framework focuses on the social, political, and economic conditions that enable (or impede) the exercise of the human rights to decide if, when, and how to parent, free from discrimination. Through this

[1] Pursuant to Fed. R. App. P. 29(a)(2), *amici* file this brief with the consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

intersectional lens,[2] the reproductive justice framework works to dismantle the inequalities at the root of reproductive oppression.

Because *amici* believe that everyone should have the power to make decisions regarding their own bodies and access the healthcare they need, they have a strong interest in this case.

PRELIMINARY STATEMENT

In its landmark ruling, *Roe v. Wade*, 410 U.S. 113 (1973), the Supreme Court held that the Constitution protects a pregnant person's "fundamental right" to obtain a pre-viability abortion. In *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed *Roe's* "essential holding recognizing a woman's right to choose an abortion before fetal viability." Yet H.B. 2263/S.B. 2196 (the "Act") prohibits Tennesseans from exercising this well-settled right by (1) banning *all* abortions (including pre-viability abortions) where the provider "knows" her patient is seeking the abortion because of the fetus' race, sex, or Down syndrome diagnosis

[2] Intersectionality is a framework for analyzing the human experience by acknowledging the complex, overlapping systems of privilege, oppression, and identities that affect one's individual reality. A woman of color, for example, faces challenges that stem from each of her marginalized identities simultaneously, not one or another in isolation. *See* Arica L. Coleman, *What's Intersectionality? Let These Scholars Explain the Theory and Its History*, Time (Mar. 29, 2019), https://tinyurl.com/y9p34dt5.

(the "Reason Bans")[3] and (2) imposing a series of cascading pre-viability gestational bans that take effect as early as six weeks after a woman's last menstrual period ("LMP") (the "Cascading Bans"). Both provisions of this plainly unconstitutional law will inflict devastating harms on AAPI women[4] if the district court's order preliminarily enjoining enforcement of the Act is not affirmed. *See* Dkt. 41, *Memphis Ctr. v. Slatery*, No. 3:20-cv-00501 (M.D. Tenn. July 24, 2020).

First, the sex-selective Reason Ban (known as a "sex-selective abortion ban" or "SSAB") reflects, reinforces, and promotes racist stereotypes that will almost certainly result in AAPI women being denied the same abortion care that will still be available to non-AAPI women. SSABs, like the one imposed by the Act, have their historical roots in the false, harmful stereotype that AAPI women prefer sons to daughters and are therefore more likely to abort female fetuses.[5] These laws have been passed predominantly in states with fast-growing AAPI populations,[6] and the

[3] Because this Court granted Defendants-Appellants' motion to stay the preliminary injunction order with respect to the Reason Bans, those provisions of the Act are currently being enforced in Tennessee. *See* Dkt. 33-2.

[4] Although this brief uses the term "women," *amici* acknowledge that transgender and non-binary people rely on abortion services, and that these individuals may also be harmed by the Act. In this brief, *amici* focus specifically on the harms inflicted by the Act on AAPI women in Tennessee.

[5] Brian Citro, et al., *Replacing Myths with Facts: Sex-Selective Abortion Laws in the United States*, Cornell Law Fac. Publ'ns, Paper 1399, 24-28 (2014), https://tinyurl.com/yd6wpaol.

[6] Elizabeth M. Hoeffel, et al., *The Asian Population: 2010, 2010 Census Briefs*, U.S. Census Bureau 7 (March 2012), https://tinyurl.com/k454xz3 (showing that *all* states

legislators who introduce, sponsor, and vote for SSABs routinely use racialized language targeting AAPI women when advocating for their passage.[7]

By relying on legislative findings that claim (1) sex-selective abortions are "widespread . . . in Asia" and (2) recent evidence "suggests that sex-selective abortions of girls are common among *certain populations* in the United States[,]" *see* Tenn. Code Ann. § 39-15-214(a)(60) (2020) (emphasis added), the State is calling upon these same stereotypes, laying bare the racist motives behind the SSAB.[8] For AAPI women in Tennessee, the consequences of the SSAB and its racist origins are grave—by enacting an unconstitutionally vague law grounded in harmful stereotypes, the State is effectively forcing abortion providers to racially profile their AAPI patients when attempting to discern their reasons for seeking an abortion.

And while the State tries to paint the motives for the SSAB as benevolent, claiming the legislature enacted it to "eradicat[e] discrimination against its female citizens,"[9] the SSAB is, in reality, a "wolf[] in sheep's clothing."[10] The proponents

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that have passed SSABs as of Dec. 1, 2020 experienced a change of at least 40% for the population of "Asian alone or in combination" from 2000-2010).

[7] *See Wolves in Sheep's Clothing: The Impact of Sex-Selective Abortion Bans on Asian American and Pacific Islander Women*, Asian Am. Pol'y Rev. (June 3, 2014), https://tinyurl.com/y73qlavm ("*Wolves*"); *see also* Molly Redden, *GOP Lawmaker: We Need to Ban Sex-Selective Abortions Because of Asian Immigrants*, Mother Jones (Mar. 27, 2014), https://tinyurl.com/ydblrm3n.

[8] Defendants-Appellants' Opening Brief, Dkt. 21 at 13 ("OB").

[9] OB at 42-43.

[10] *Wolves*, *supra* n.7.

of the SSAB are co-opting the language of the gender equality movement to advance an anti-abortion agenda aimed at "overturning or at least chipping away at *Roe v. Wade*."[11]

Further illustrating that the true objective of SSABs is not to eradicate gender discrimination, many of the states that have enacted similar laws have some of the *worst* records on women's rights.[12] Indeed, the same Tennessee lawmakers who passed the Act refused to provide $6 million in funding for post-natal care during the same legislative session.[13] That the SSAB was passed as part of an omnibus bill that also includes the Cascading Bans makes clear that the legislature's actual intent was to ban *all* abortions in the state—not protect the "rights" of female fetuses.

Second, the Cascading Bans will impose the most significant burdens—and thus the most harm—on low-income and immigrant women of color, including

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[11] Kayla Epstein, *This abortion bill is probably unconstitutional. A Republican lawmaker says that's the point*, Wash. Post (Aug. 12, 2019), https://tinyurl.com/yc6ogr7s; *see also* Meeting on HB 2263 before the H. Subcomm. on Pub. Health, 111th General Assembly (Tenn. May 27, 2020) (statement by Rep. Jerry Sexton, Chair, H. Subcomm. on Pub. Health), https://tinyurl.com/y9fvahsa (at 00:13:56) (explaining intent to provide the Supreme Court with "the right formula . . . to go back and reverse" *Roe*).

[12] *The Best and Worst States to be a Woman*, Geo. Inst. for Women, Peace and Sec. 2 (2020), https://tinyurl.com/yb3dwqq9 (ranking all but two states with SSABs as falling below the national average for women's rights and opportunities); *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, Guttmacher Inst. (Dec. 1, 2020), https://tinyurl.com/y6b3ufae (listing states in the U.S. that have passed SSABs).

[13] Tina Vasquez, *The strictest abortion ban in the nation targets communities of color*, PRISM (July 3, 2020), https://tinyurl.com/yc5hj86l.

AAPI women, who already confront numerous obstacles in accessing abortion care. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 343 (1980) (Marshall, J., dissenting) ("The class burdened by the Hyde Amendment consists of indigent women, a substantial proportion of whom are members of minority races"); *see also June Medical Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2130 (2020). As the State acknowledges, "the abortion rate for non-white women during the previous decade was nearly four times higher than the rate for white women."[14] This reflects the fact that 75% of women who obtain abortions are low income,[15] and women of color, including AAPI women, are more likely to be low income than white women.[16] This economic disparity, combined with the immigration and language-related challenges many AAPI immigrant women experience, limits the ability of AAPI women to access and pay for reproductive healthcare, including abortion care.[17] These same factors also

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[14] OB at 13.

[15] Declaration of Dr. Kimberly Looney in Support of Plaintiffs' Motion for Temporary Restraining Order and/or Preliminary Injunction ("TRO/PI Motion"), Dkt. 8-1, at ¶ 39, *Memphis Ctr. v. Slatery*, No. 3:20-cv-00501 (M.D. Tenn. June 22, 2020) ("Looney Decl.").

[16] Robin Bleiweis, et al., *The Basic Facts About Women In Poverty*, Ctr. Am. Progress (Aug. 3, 2020), https://tinyurl.com/y7ofcn43.

[17] *See, e.g.*, Athena Tapales, et al., *The sexual and reproductive health of foreign-born women in the United States*, 98 Contraception 47, 50 (Feb. 9, 2018), https://tinyurl.com/ydazjxj9 (analyzing immigration and language-related barriers in accessing contraception); Carolyn Y. Fang, et al. *Overcoming Barriers to Cervical Cancer Screening Among Asian American Women*, 4 N. Am. J. Med. Sci. 77 (2011), https://tinyurl.com/yay2gjlj (finding that Asian American women have one of the lowest rates of cervical cancer screening due to the cost of pap smears, lack of insurance, and limited English proficiency).

contribute to a number of physiological effects that may prevent AAPI women from discovering their pregnancies in the weeks following fertilization. As a result, AAPI women are particularly vulnerable to the harms imposed by the Cascading Bans. Moreover, because unplanned pregnancies can decrease a woman's earnings, denying poor AAPI women pre-viability abortions exacerbates their economic hardships and increases their reliance on public services.[18]

ARGUMENT

I. THE SEX-SELECTIVE REASON BAN IRREPARABLY HARMS AAPI WOMEN IN TENNESSEE

A. The Sex-Selective Reason Ban Was Motivated by False, Racist Stereotypes

The State's briefing concedes that the Act's SSAB was motivated, at least in part, by the racist stereotype that AAPI women prefer sons to daughters. In a subsection titled "Discrimination,"[19] the State invokes Tenn. Code Ann. § 39-15-214(a)(60), one of the General Assembly's legislative findings, which states in pertinent part:

> There is substantial evidence from across the globe and in the United States that the elimination of children with unwanted characteristics is already occurring. . . . Widespread sex-selective abortions in Asia have led to as many as one hundred sixty (160) million 'missing' women. In India, as a result of the abortion of 300,000-700,000 female unborn children each year

[18] *See* Diana Greene Foster, et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am. J. Public Health 407 (2018), https://tinyurl.com/ybavkqj3.
[19] OB at 13.

> over several decades, there are currently about fifty (50) million more men than women in the country. Recent evidence also suggests that sex-selective abortions of girls are common among certain populations in the United States[.]

Tenn. Code Ann. § 39-15-214(a)(60).[20] This legislative finding reflects racist stereotyping on numerous levels.

First, the finding on its face conflates abortion practices in Asian countries with abortion practices among AAPI women in the United States and presumes an equivalence.[21] There is no reliable evidence to support such a conclusion.

Second, the finding's subtext perpetuates the stigma that people from Asian cultures behave in ways that are morally wrong, and that consequently, "certain populations in the United States" should be more severely scrutinized when trying to access abortion services. The way in which the State's briefing identifies those "certain populations" makes clear that the SSAB was enacted to target nonwhite women. Specifically, immediately after its discussion of sex-selective abortions in Asia, the State points to the fact that, within the last decade in Tennessee, the "abortion rate for nonwhite women . . . was nearly four times higher than the rate for

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[20] This "legislative finding" echoes almost verbatim Justice Clarence Thomas's recent concurrence in *Box v. Planned Parenthood of Ind. and Ky., Inc.*, 139 S. Ct. 1780, 1783 (2019), which itself was rooted in a biased and ahistorical account of the eugenics movement. *See* Adam Cohen, *Clarence Thomas Knows Nothing of My Work*, The Atlantic (May 29, 2019), https://tinyurl.com/y2q4bsld.

[21] While legislative findings are entitled to deference, they should still be critically reviewed. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007).

white women,"[22] inviting the inference that at least some of these abortions were due to the sex of the fetuses. By linking the findings of § 39-15-214(a)(60) to § 39-15-214(a)(62), the State confirms that the SSAB is targeting AAPI women based on an unproven and unsupported stereotype that they will abort female fetuses as women in Asian countries allegedly do.[23]

This stereotype is not only harmful—it is demonstrably false. For example, the key study cited by SSAB proponents relies on 20-year-old data from the 2000 United States Census.[24] While that study found male-biased sex ratios at birth for the second and third children of foreign-born Chinese, Indian, and Korean families after they had already given birth to one or two girls, anti-abortion advocates made the unfounded leap that this necessarily means sex-selective abortions are widespread in the United States.[25] Notably, the study did not examine sex ratios at birth among Asians born in the United States, nor did it find male-biased sex ratios for the first births of foreign-born Chinese, Indians, and Koreans. Instead, "[a]n

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[22] OB at 13 (citing §§ 39-15-214(a)(60) and (62)).

[23] The State also ignores the reality that the vast majority of abortions in the U.S. occur before it is possible to determine the sex of the fetus. *See Reproductive Health: CDCs Abortion Surveillance System FAQs, Abortion Surveillance - Findings and Reports,* Centers for Disease Control and Prevention (Nov. 25, 2020), https://tinyurl.com/yaqzohyv ("The majority of abortions in 2018 took place early in gestation: 92.2% of abortions were performed at ≤13 weeks' gestation.").

[24] *See Box,* 139 S. Ct. at 1791 (Thomas, J., concurring) (citing Almond & Edlund, *Son-Biased Sex Ratios in the 2000 United States Census*, 105 Proc. Nat. Acad. Sci. 5681 (2008)).

[25] Citro, *supra* n.5, at 15.

analysis of more recent national data of sex ratios at birth of foreign-born Chinese, Indians and Koreans shows that these groups have *more* girls overall than white Americans."[26]

The partisan advocacy pieces cited by the State's *amici* further reveal that claims concerning the "widespread" practice of sex-selective abortions in the United States are based on unreliable data. Indeed, the American Center for Law and Justice's *amicus* brief cites only one article that discusses American abortion statistics—a piece called "Sex Selection Abortions are Rife in the U.S.," which was originally published in the *Daily Signal*, a conservative online platform, and then republished in *Newsweek*.[27] Rather than describing peer-reviewed studies, the article relies entirely on findings from the anti-abortion Charlotte Lozier Institute. Echoing a claim made in the legislative findings,[28] *amici* point to a finding that sex-selective abortions in Asia have led to over 100 million "missing" women[29]—ignoring that

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[26] *Id.* (emphasis in original).

[27] Am. Ctr. Law Justice amicus brief, Dkt. 25 ("Am. Ctr. Amicus Br.") at 10 (citing Kelsey Harkness, *Sex Selection Abortions are Rife in the U.S.*, Newsweek (April 14, 2016), https://tinyurl.com/yaqv49rd).

[28] Tenn. Code Ann. § 39-15-214(a)(60) ("Widespread sex-selective abortions in Asia have led to as many as one hundred sixty (160) million 'missing' women."); *see also Box*, 139 S. Ct. at 1791 (Thomas, J., concurring) (same).

[29] Am. Ctr. Amicus Br. at 10. The "missing women" statistic emerged from research by Mara Hvistendahl. *See* Mara Hvistendahl, *Where Have All the Girls Gone?*, Foreign Pol'y (June 27, 2011), https://tinyurl.com/y7gz7f5k.

the study's author has stated unequivocally that curtailing abortion rights will not remediate this discrepancy.[30]

Lastly, while the State disingenuously claims to be acting out of a "compelling interest in eradicating discrimination against its female citizens," this purported motivation fails to pass constitutional muster.[31] The Supreme Court held unequivocally in *Casey*: "Before viability, the State's interests *are not strong enough* to support a prohibition of abortion." 505 U.S. at 846 (emphasis added). Further, even if, as the State suggests, the Court should apply a test akin to rational basis review, *see EMW Women's Surgical Ctr., P.S.C. v. Friedlander*, 978 F.3d 418, 433 (6th Cir. 2020), the State has not articulated how the SSAB is "reasonably related" to its purported interest of eradicating discrimination. *See, e.g.*, *City of Cleburne, Tex.*, *v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) ("The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."). Significantly, the State does not (and cannot) point to any credible evidence that SSABs have any measurable impact on imbalanced sex ratios at birth.[32] Nor can the State even contend that there is any

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[30] Mara Hvistendahl, *The Abortion Trap*, Foreign Pol'y (July 27, 2011), https://tinyurl.com/ybm4oanq ("For nearly two decades, anti-abortion activists have been at work in a disingenuous game, using the stark reduction of women in the developing world as an argument for taking away hard-earned rights.").

[31] OB at 42 (citing *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

[32] Indeed, one study found that SSABs in Illinois and Pennsylvania had no effect on sex ratios at birth in those states. Citro, *supra* n.5, at 12-14.

imbalance in sex ratios in Tennessee.[33] It is therefore clear that the SSAB serves only to chip away at abortion rights and increase discrimination against pregnant AAPI women, and thus has no conceivable connection to the State's purported goal of eradicating gender discrimination. Indeed, in arguing there are myriad ways for women to circumvent the SSAB, the State has effectively conceded that this law will not actually achieve its purported goal.[34]

B. As a Result of These False, Racist Stereotypes, the Unconstitutionally Vague Sex-Selective Reason Ban Disproportionately Harms AAPI Women

As discussed *supra* in Section I.A, in enacting the SSAB, the State was plainly motivated by the false, racist stereotype that AAPI women prefer sons to daughters and are therefore more likely to abort female fetuses. The State's implicit endorsement of this falsehood, combined with the Act's unconstitutionally vague language and imposition of harsh criminal penalties, will almost certainly lead to AAPI women being denied abortion care that will still be available to non-AAPI women.

The SSAB prohibits healthcare providers from providing an abortion where the provider "knows" her patient is seeking the abortion "because of" the sex of the fetus. Tenn. Code Ann. § 39-15-217(b). Yet the Act offers no explanation or

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[33] *See, e.g.*, *Tennessee Population*, World Population Rev. (2020), https://tinyurl.com/yb8pf4h8.

[34] OB at 45.

guidance regarding the terms "knows" or "because of" in this context. In their attempts to fill this lacuna, healthcare providers in Tennessee will have no option but to adopt subjective, and likely inconsistent, interpretations of the law.

To wit, many providers have already expressed significant confusion regarding the SSAB's "because of" requirement. For example, one provider asked whether the term "because of" means "the only reason, the main reason, one of many reasons, or simply a factor that the individual considered,"[35] while another questioned "how the law might be implicated" when a patient simply discusses the fetus' sex with her provider.[36] This uncertainty is compounded by the fact that patients may seek abortions for a variety of independent yet interrelated reasons. And while some patients may disclose some or all of the factors that have led them to seek an abortion, many do not.[37]

The vagueness of the law poses grave consequences,[38] especially for AAPI women. Any provider who violates the Act faces harsh criminal sanctions, including being charged with a Class C felony punishable by up to 15 years' imprisonment and/or a fine of up to $10,000. *See* Tenn. Code Ann. § 40-35-111(b)(3). Confronted with this threat of severe punishment, providers will inevitably be forced to adopt

[35] Looney Decl. ¶ 45.
[36] Declaration of Melissa Grant in Support of TRO/PI Motion ("Grant Decl."), Dkt. 8-6, at ¶ 22.
[37] Looney Decl. ¶ 41.
[38] *See* Plaintiffs-Appellees' Brief, Dkt. 39, at 26-38.

the "most aggressive reading of the statute"[39] and will have no choice but to take into account the State-sanctioned stereotype that AAPI women are more inclined to abort female fetuses when attempting to deduce their patients' motives. Put more plainly, the legislature is encouraging racial profiling against AAPI women seeking abortions in Tennessee by promoting a discriminatory narrative about sex-selective abortion practices among Asians and Asian Americans.

Unsurprisingly, a number of healthcare providers have already expressed significant concerns over the risk of prosecution where a patient simply "mention[s] [the] race or sex"[40] of her fetus or "ask[s] the sex of the fetus during the ultrasound."[41] The State's response—that doctors "need not be concerned . . . if a patient simply makes a reference to the sex of her fetus, the race of the father, or her age" because any sort of "[s]tray reference, *without more*, would not give a doctor knowledge that the abortion was being sought *because of* . . . a prohibited reason"[42]—offers little reassurance. The State leaves unanswered what real-world factors would constitute the something "more" under these circumstances. Given the racist stereotyping the Act encourages, the simple fact that a woman is AAPI could be the "more" sufficient to legally prevent her from obtaining an abortion.

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[39] Grant Decl. ¶ 20.
[40] Declaration of Rebecca Terrell in Support of TRO/PI Motion, Dkt. 8-5, at ¶ 20.
[41] Supplemental Declaration of Dr. Kimberly Looney in Support of TRO/PI Motion, Dkt. 34-1, at ¶ 4.
[42] OB at 30, 46 (emphasis added; internal citations omitted).

Moreover, an effective doctor-patient relationship requires trust, transparency, and honesty. The legislature is inappropriately intruding into this trusted relationship by forcing AAPI women and their doctors to engage with the racist stereotypes underlying the SSAB. When patients and doctors do not feel they can communicate openly for fear of implicating false assumptions based entirely on the patients' race and/or national origin, doctors cannot provide optimal care and counseling, and the quality of the reproductive healthcare will suffer.[43] This is particularly true for patients who are already in a vulnerable position, such as immigrant women and women living in poverty, many of whom may already be uncomfortable in a healthcare setting. These challenges will be exacerbated when the patient is not fluent in English, as is the case for many AAPI immigrants in Tennessee. *See* Section II.A *infra*.

An AAPI woman denied an abortion under the SSAB because of the racist stereotyping propounded by the State will be forced to either carry her pregnancy to term or seek an abortion in another state. In both instances, she will have to endure economic, emotional, and physical burdens that would not be imposed on a non-AAPI woman in similar circumstances.[44] The SSAB will therefore continue to

[43] *See* Grant Decl. ¶ 24.

[44] In the event the Reason Bans are upheld, and the Cascading Bans are struck down, AAPI women will face yet another unique hurdle in obtaining abortions in Tennessee. Tennessee recently enacted a law requiring that all women seeking abortions first undergo an ultrasound procedure. During that procedure, the

irreparably harm AAPI women in Tennessee if the preliminary injunction order is not upheld.

II. THE CASCADING BANS WILL IRREPARABLY HARM AAPI WOMEN IN TENNESSEE

A. Because AAPI Women in Tennessee Encounter Numerous Barriers in Accessing Reproductive Healthcare, They Will Be Disproportionately Harmed by the Cascading Bans

Access to abortion care is critical to protecting both the emotional wellbeing and financial independence of women and families in underserved minority communities. Even before the Act's enactment, women seeking abortions in Tennessee confronted an increasing number of obstacles—many of which were imposed by the same lawmakers who are now attempting to ban nearly all pre-viability abortions in the state.[45] These State-imposed impediments fall harder on

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technician must describe the "the presence of external members and internal organs if present and viewable." *See* Tenn. Code Ann. § 39-15-215(b)(5). These features may indicate the sex of the fetus as early as 12 weeks into pregnancy. *See* Farideh Gharekhanloo, *The ultrasound identification of fetal gender at the gestational age of 11-12 weeks*, 7 J. Fam. Med. Primary Care 210 (Jan.-Feb. 2018), https://tinyurl.com/y7j6a5bu. Thus, if an AAPI woman decides to proceed with an abortion after learning she is carrying a female fetus as a result of the mandatory ultrasound, she may be subjected to racist stereotyping regarding her motive for the abortion—even if the fetus' sex was unknown to her at the time she made the initial decision to seek an abortion. *See, e.g.,* April Shaw, *How Race-Selective and Sex-Selective Bans on Abortion Expose the Color-Coded Dimensions of the Right to Abortion and Deficiencies in Constitutional Protections for Women of Color*, 40.3 N.Y.U. Rev. Law Soc. Change 545, 559, 570 (2016), https://tinyurl.com/ybq44unm.

[45] *See, e.g.*, Tenn. Code Ann. § 39-15-215(b) (requiring that a physician or ultrasound technician perform an ultrasound, display and describe the images to the patient in State-specified detail, and produce the sounds of fetal cardiac activity, if

AAPI women, who often confront additional economic, immigration, and linguistic barriers that substantially impede their ability to obtain abortions.

First, the "single most common reason women cite for wanting an abortion is because they cannot afford to raise a child."[46] This fact is particularly resonant for AAPI women, who comprise one of the fastest-growing populations living in poverty since the Great Recession.[47] From 2007 to 2011, "the number of Asian Americans in poverty increased by 37 percent and Pacific Islander poverty increased by 60 percent—far higher than any other group and well surpassing the U.S. national increase of 27 percent."[48] In Tennessee, Pacific Islanders are more likely than *any*

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audible, 48 hours prior to providing an abortion); *id.* § 39-15-218 (requiring that a chemical abortion (*i.e.*, a pill) be administered in an ambulatory surgical center, clinic, or doctor's office where more than 50 abortions have been performed in the past calendar year); *id.* § 39-15-202(b)(5) (2015) (requiring in-person counseling and a 48-hour waiting period prior to the abortion procedure); *id.* § 56-26-134 (2010) (prohibiting Affordable Care coverage for abortions).

[46] Ronnie Cohen, *Denial of abortion leads to economic hardship for low-income women*, Reuters (Jan. 18, 2018), https://tinyurl.com/ybo3ruj5.

[47] *See, e.g.*, Karthick Ramakrishnan, *Income and Poverty*, Ctr. Am. Progress 6 (July 21, 2014), https://tinyurl.com/y9lhhodj; *see also* Jessica Arons, et al., *How the Hyde Amendment Discriminates Against Poor Women and Women of Color*, Ctr. Am. Progress (May 10, 2013), https://tinyurl.com/y9fg52y8.

[48] *See, e.g.*, Ramakrishnan, *supra* n.47; *see also* Arons, *supra* n.47 (noting that 67%, 66%, and 47% of people of Laotian, Hmong, and Cambodian descent, respectively, live in poverty in the U.S., and 20% of women of Southeast Asian descent are covered by Medicaid). It is important to note that because Asian Americans are often under-sampled or mislabeled (*e.g.*, categorized as "other") in data on poverty and social services, their participation in programs like the Supplemental Nutrition Assistance Program is substantially underreported. *See* Victoria Tran, *Asian Americans are falling through the cracks in data representation and social services*, Urban Inst. (June 19, 2018), https://tinyurl.com/y7s6ulkx.

other racial subgroup to live in poverty, with almost 34% living below the poverty level.[49] Occupational statistics also demonstrate significant economic inequities for AAPI women. Numerous Asian ethnic subgroups make up a disproportionate percentage of women in the low-paid workforce.[50] And while white women in the United States are paid only 82¢ for every $1 a man is paid, the disparity can be as low as 52¢ for AAPI women.[51]

These economic inequalities curtail the ability of AAPI women to pay for quality reproductive care. Critically, because Tennessee prohibits Medicaid coverage for abortions except in cases of rape, incest, and where the life of the mother is danger,[52] AAPI women who are poor enough to qualify for Medicaid must still pay for all of their abortion expenses out of pocket. Moreover, in Tennessee, these costs are not limited to the cost of the procedure itself. Because over 60% of women in Tennessee live in counties without abortion providers,[53] patients

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[49] *Tennessee Population*, *supra* n.33.

[50] *Occupational Employment Statistics, National Occupational Employment and Wage Estimates United States*, U.S. Bureau Lab. Stat. (May 2018), https://tinyurl.com/rv3r8pl (Vietnamese, Thai, Nepalese, and Burmese women comprise, respectively, 0.67%, 0.1%, 0.05%, and 0.04% of the overall workforce but respectively 1.29%, 0.16%, 0.9%, and 0.8% of women in the low-paid workforce).

[51] Jasmine Tucker, *Equal Pay for Asian American and Pacific Islander Women*, Nat'l Women's Law Ctr. 2 (January 2020), https://tinyurl.com/y9ktj452.

[52] *State Funding of Abortion Under Medicaid*, Guttmacher Inst. (Dec. 1, 2020), https://tinyurl.com/y9v3y2kd.

[53] *State Facts About Abortion: Tennessee*, Guttmacher Inst. (2020), https://tinyurl.com/yd47xewz.

frequently incur transportation, lodging, and childcare expenses when undergoing the procedure.[54] By criminalizing abortions at six weeks LMP, the Cascading Bans deny poor AAPI women the time they need to save money for the procedure and its related costs. This law will therefore force poor AAPI women to have children they cannot afford and will almost certainly increase their reliance on social services.[55]

Second, immigration-related challenges impose an additional burden on AAPI immigrant women. As of 2018, almost 24% of foreign-born people in Tennessee identify as Asian.[56] Nationally, "millions of women face structural barriers to obtaining such coverage and care, based solely on their immigration status."[57] Immigrants—including those in the United States lawfully—face significant hurdles in obtaining insurance coverage.[58] These barriers result in serious consequences for the reproductive healthcare of AAPI women, as illustrated by the fact that "foreign-

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[54] *See, e.g., Induced Abortion in the United States*, Guttmacher Inst. (Sept. 2019), https://tinyurl.com/y8mk62m8*; see also June Medical Servs.*, 140 S. Ct. at 2130 (recognizing that "the burdens of this increased travel would fall disproportionately on poor women, who are least able to absorb them").

[55] *See* Greene, *supra* n.18 (finding that being denied an abortion quadrupled the odds that a new mother and her child would live below the federal poverty line); *see also* Vasquez, *supra* n.13 (detailing Tennessee lawmakers' refusal to provide funding for post-natal care).

[56] *State Immigration Data Profiles: Tennessee*, Migration Pol'y Inst. (2001-2010), https://tinyurl.com/yd28vsnz.

[57] Kinsey Hasstedt, et al., *Immigrant Women's Access to Sexual and Reproductive Health Coverage and Care in the United States*, The Commonwealth Fund (Nov. 20, 2018), https://tinyurl.com/y7zc59v6.

[58] *Id*. (noting that many legal immigrants are ineligible to enroll in Medicaid during the first five years of their legal residency).

born . . . women are less likely to receive [sexual and reproductive health]-related cancer screenings than their U.S.-born counterparts."[59] And because four out of five AAPI low-wage workers are immigrants,[60] these immigration-related challenges are often compounded by the economic difficulties described above.

Third, 35% of AAPIs in the United States have limited English proficiency,[61] which severely hinders their ability to access reproductive healthcare.[62] The inability to clearly and comfortably communicate in English prevents many AAPI women from both "discuss[ing] medical problems with a physician or nurse and . . . complet[ing] an insurance application."[63] AAPI women in Tennessee who require the assistance of translation services to navigate the healthcare system will likely

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[59] Tapales, *supra* n.17, at 47; *see also* Shaun Mehr, *Immigrant Women Remain Less Likely than Native-born U.S. Women to be Screened*, Onco'Zine (Sept. 19. 2011), https://tinyurl.com/y7hatlbp.

[60] *Inside the Numbers: How Immigration Shapes Asian American and Pacific Islander Communities*, Asian Ams. Advancing Just. 4 (June 2019), https://tinyurl.com/ycfozamj.

[61] Karthick Ramakrishman, et al., *Language Diversity and English Proficiency*, Ctr. Am. Progress 1 (May 27, 2014), https://tinyurl.com/y9kyjlre (Asian Americans have the highest proportion of residents speaking a language other than English at home); *A Community of Contrasts Asian Americans in the United States: 2011*, Asian Am. Ctr. Advancing Just. 4 (2011), https://tinyurl.com/y8smm3ne ("[R]oughly one out of every three Asian Americans are limited-English proficient (LEP) and experience some difficulty communicating in English.").

[62] *See, e.g.*, Fang, *supra* n.17 (discussing language barriers in the context of cervical cancer screenings).

[63] Leighton Ku, et al., *How Race/Ethnicity, Immigration Status and Language Affect Health Insurance Coverage, Access to Care and Quality of Care Among the Low-Income Population*, Kaiser Comm'n on Medicaid and the Uninsured 4 (Aug. 2003), https://tinyurl.com/ycoyceg9.

find it all but impossible to access those services and obtain an abortion before the Cascading Bans make it illegal for them to do so.

Because AAPI women confront a multitude of interconnected challenges in seeking reproductive healthcare, they are less equipped to obtain an abortion before the Cascading Bans make it illegal to do so and will face devastating personal, economic, and familial consequences if the preliminary injunction is not upheld.

B. Because AAPI Women in Tennessee May Be Less Likely to Discover They Are Pregnant in the Early Stages of Their Pregnancies, They Will Be Disproportionately Harmed by the Cascading Bans

The Cascading Bans criminalize all abortions in Tennessee as early as four weeks after fertilization. But women who do not menstruate on a regular, predictable schedule cannot effectively monitor their menstrual cycles, which in turn makes it difficult—if not impossible—to identify a missed period in the weeks following fertilization.[64] And because symptoms such as nausea and fatigue frequently do not develop until well after six weeks LMP, a missed period may be the only early indicator that a woman is pregnant.[65] For this reason, women who experience irregular menstrual cycles are less likely to realize they are pregnant in the early

[64] Christine Caron, *What Does It Really Mean to Be 6 Weeks Pregnant?*, N.Y. Times (Apr. 19, 2020), https://tinyurl.com/y76mjq7y (explaining that "women with irregular menstrual cycles might find it 'especially challenging' to discover that they're pregnant right away").
[65] *See id*.

stages of their pregnancies, making it all but impossible for them to seek an abortion before the Cascading Bans make it illegal for them to do so.[66]

AAPI women in particular may be more likely to experience irregular menstrual cycles for at least two reasons: (1) studies show AAPI women have higher rates of endometriosis, which often results in irregular cycles, and (2) as compared to the general population, AAPI women are statistically more likely to experience poverty-induced food insecurity and prolonged stress, both of which have been found to cause irregular cycles.

Endometriosis is a "common, benign gynecologic condition characterized by the presence of endometrial-like lesions in areas outside of the uterus"[67] and is known to cause irregular menstrual cycles.[68] Numerous studies conducted over the past several decades have found that AAPI women are more likely to suffer from endometriosis than other racial groups,[69] with one recent study finding that

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[66] This will be the case regardless of whether the Cascading Bans are ultimately enforced at six, eight, or even 10 weeks LMP.

[67] Ayae Yamamoto, et al., *A higher prevalence of endometriosis among Asian women does not contribute to poorer IVF outcomes,* 34 J. Assisted Reprod. Genetics 765, 765 (Apr. 17, 2017), https://tinyurl.com/yacwo89p.

[68] Sanjay K. Agarwal, MD, *Clinical diagnosis of endometriosis: a call to action*, 220 Am. J. Obstetrics Gynecology 354, 356 (Apr. 2019), https://tinyurl.com/yc2snauf (explaining that certain "menstrual cycle characteristics were more prevalent among women with vs without diagnosed endometriosis, including . . . irregular menstrual periods"); *see also Abnormal Menstruation (Periods)*, Cleveland Clinic (Aug. 25, 2019), https://tinyurl.com/y9k66oxn.

[69] *See, e.g.*, Kulenthran Arumugam, et al., *Endometriosis and Race*, Obstetrics & Gynaecology 164, 165 (May 1992), https://tinyurl.com/y7l7g85o (finding that

endometriosis is "significantly" more prevalent in Asian women than in Caucasian and Black women.[70] Indeed, while endometriosis affects around 10% of the general population of reproductive-age women, that study found that nearly 16% of women of Asian origin were affected by the condition.[71] AAPI women are therefore more likely to experience endometriosis-induced irregular menstrual cycles, making them particularly vulnerable to any pre-viability gestational ban, especially one that takes effect in the weeks after fertilization.

Moreover, as discussed *supra* in Section II.A, AAPI women are statistically more likely to live in poverty, meaning they are more likely to experience higher rates of food insecurity.[72] It is well-established that poor nutrition is a direct cause of irregular menstrual cycles.[73] And because immigrants and women living in

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"Asian women have a significantly greater risk of developing endometriosis than Caucasian women"); H. Sangi-Haghpeykar, et al., *Epidemiology of endometriosis among parous women*, 85 Obstetrics and Gynecology 983 (June 1995), https://tinyurl.com/yczq58b8 (finding that "Asian race" was a "factor[] associated with an increased risk for endometriosis").

[70] Ayae Yamamoto, et al., *A higher prevalence of endometriosis among Asian women does not contribute to poorer IVF outcomes,* 34 J. Assisted Reprod. Genetics 765, 765 (Apr. 17, 2017), https://tinyurl.com/yacwo89p.

[71] *See id*.

[72] *See Food Security in the U.S., Key Statistics & Graphics*, Econ. Rsch. Serv. U.S. Dep't Agric. (Sept. 9, 2020), https://tinyurl.com/y86buclw.

[73] Jaleesa Baulkman, *How Your Diet Can Influence Your Menstrual Cycle*, Med. Daily (Apr. 20, 2016), https://tinyurl.com/y7e53tdh; Andisheh Jahangir, *Do nutritional deficiencies lead to menstrual irregularities?*, 4 Int'l J. Nutritional Sci. Food Tech. 27, 29 (July 2018), https://tinyurl.com/y7mb9twa (a "high prevalence of nutritional deficiencies among women and girls can cause menstrual irregularities").

poverty experience higher rates of prolonged stress,[74] a known driver of irregular menstrual cycles,[75] the harms inflicted by the Act will be compounded further for AAPI women.

Because AAPI women may experience increased rates of irregular menstrual cycles due to both biological and social factors, they may be less likely to realize they are pregnant in the weeks following fertilization and will thus be irreparably harmed if the preliminary injunction order is not upheld.

CONCLUSION

For the foregoing reasons, the district court's preliminary injunction order enjoining the State from enforcing the Act is in the public interest and should be upheld to prevent irreparable injury to AAPI women in Tennessee.

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[74] *See* Judith D. Kasper, et al., *Effects of Poverty and Family Stress Over Three Decades on Functional Status of Older African American Women*, 63 J. Gerontology: Series B, 2, 9-10 (July 2008), https://tinyurl.com/y8rvuwbd; Carol Graham, *The high costs of being poor in America: Stress, pain, and worry*, Soc. Mobility Memos (Feb. 19, 2015), https://tinyurl.com/yd8ur2go; E.J.R. David, *The Psychological Toll Facing Immigrants in Today's America*, Psych. Today (Sept. 6, 2017), https://tinyurl.com/ycltov84.

[75] Shahida Nagma, et al., *To Evaluate the Effect of Perceived Stress on Menstrual Function*, 9 J. Clinical Diagnostic Res. QC01 (Mar. 1, 2015), https://tinyurl.com/y7umnux8; Arpita Halder, *Irregular periods? Depression and anxiety could be the* cause, Deccan Chron. (May 28, 2019), https://tinyurl.com/yb5nozgn.

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CERTIFICATE OF COMPLIANCE

This *amicus curiae* brief contains 6,338 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and is no more than one-half the maximum number of words allowed for the Plaintiffs-Appellees' principal brief. *See* Fed. R. App. P. 29(a)(5). This brief also complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in Times New Roman 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify that on December 22, 2020, I caused the foregoing *amicus curiae* brief to be filed electronically via the Court's CM/ECF system, which will provide notice of filing to all registered attorneys involved in this appeal. *See* Fed. R. App. P. 25(d); 6th Cir. R. 25(f)(2).

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