No. 22A902

IN THE

Supreme Court of the United States

U.S. FOOD & DRUG ADMINISTRATION; ROBERT M. CALIFF, M.D., *Commissioner of Food & Drugs*; JANET WOODCOCK, M.D., *in her official capacity as Principal Deputy Commissioner, U.S. Food & Drug Administration*; PATRIZIA CAVAZZONI, M.D., *in her official capacity as Director, Center for Drug Evaluation & Research*; U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; XAVIER BECERRA, *Secretary, U.S. Department of Health and Human Services*,

Applicants,

v.

ALLIANCE FOR HIPPOCRATIC MEDICINE; AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS; AMERICAN COLLEGE OF PEDIATRICIANS; CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS; SHAUN JESTER, D.O.; REGINA FROST-CLARK, M.D.; TYLER JOHNSON, D.O.; GEORGE DELGADO, M.D.,

Respondents.

ON APPLICATION FOR A STAY OF THE ORDER ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., IN SUPPORT OF APPLICANTS AND ADMINISTRATIVE STAY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Julia Harte & Sharon Bernstein, *Some US Abortion Pill Providers Curb Availability After Appeals Court Ruling*, Reuters (Apr. 13, 2023), https://www.reuters.com/legal/some-us-abortion-pill-providers-curb-availability-after-appeals-court-ruling-2023-04-13/.https://www.reuters.com/legal/some-us-abortion-pill-providers-curb-availability-after-appeals-court-ruling-2023-04-13/..... 17

Justin J. Chu et al., *Mifepristone and Misoprostol Versus Misoprostol Alone for the Management of Missed Miscarriage (MifeMiso): A Randomised, Double-Blind, Placebo Controlled Trial*, 396 Lancent 770 (2020)..... 15

Kate Bahn et al., *Linking Reproductive Health Care Access to Labor Market Opportunities for Women*, Ctr. for Am. Progress (Nov. 21, 2017), https://www.americanprogress.org/issues/women/reports/2017/11/21/442653/linking-reproductive-health-care-access-labor-market-opportunities-women..... 9

Liza Fuentes, *Inequity in US Abortion Rights and Access: The End of Roe Is Deepening Existing Divides*, Guttmacher Institute (Jan. 17, 2023), https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides..... 15, 16

Mara Gordon & Sarah McCammon, *A Drug That Eases Miscarriages Is Difficult for Women to Get*, NPR (Jan. 10, 2019), https://www.npr.org/sections/health-shots/2019/01/10/666957368/a-drug-that-eases-miscarriages-is-difficult-for-women-to-get..... 15

Nat'l Partnership for Women and Families, *Fact Sheet: Black Women Experience Pervasive Disparities in Access to Health Insurance* (2019), https://www.nationalpartnership.org/our-work/resources/health-care/black-womens-health-insurance-coverage.pdf..... 16

Pien Huang & Mara Gordon, *Telehealth Abortion Demand Is Soaring. But Access May Come Down to Where You Live*, NPR (May 20, 2022), https://www.npr.org/sections/health-shots/2022/05/20/1099179361/telehealth-abortions-are-simple-and-private-but-restricted-in-many-states..... 11

Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation, U.S. Food & Drug Admin. (Jan. 4, 2023) https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation..... 5, 9

INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all Americans and to break down barriers that prevent Black people from realizing their basic civil and human rights.

For decades, LDF has pursued litigation to secure the economic rights of Black families and individuals. Litigation to ensure nondiscriminatory delivery of babies, as well as the adequacy of health care and hospital services available to Black communities has been a long-standing LDF concern. *See, e.g., Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (challenging the closing of Sydenham public hospital in Harlem under Title VI of the Civil Rights Act of 1964). LDF has also worked on behalf of Black individuals struggling with the burden of discriminatory and inadequate health care services and the resulting health crises.

Black and low-income people rely on the right to abortion care at higher rates than other groups, and face profound inequities in accessing essential health care as a result of a long history of systemic racism and discrimination. LDF has supported efforts to promote equal rights and access to reproductive health care, emphasizing the impact of restrictions on abortion access on Black women[2] and other pregnant

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

[2] *Amicus curiae*'s use of "woman" or "women" is not meant to exclude people of other gender identities that may be able to become pregnant and need to seek abortion services.

people living in poverty. *See, e.g.*, Brief for the NAACP Legal Defense & Educational Fund, Inc. and other Organizations as Amici Curiae in Support of Petitioners, *Rust v. Sullivan*, 500 U.S. 173 (1991) (Nos. 89-1391 & 89-1392), 1990 WL 10012645; Brief of Amici Curiae of the NAACP Legal Defense & Educational Fund, Inc., and other Organizations in Support of Planned Parenthood of Southeastern Pennsylvania, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744 & 91-902), 1992 WL 12006401; Brief of Amicus Curiae NAACP Legal Defense & Educational Fund, Inc., in Support of Petitioners, *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021) (No. 21-463), 2021 WL 5029029; Brief for Amici the Lawyers' Committee for Civil Rights Under Law, The Leadership Conference for Civil and Human Rights and 16 Civil Rights Organizations in Support of Respondents, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4594026.

LDF has an interest in this case, which will decide whether access to mifepristone as part of the medication abortion protocol is to be restricted nationwide. Limitations on medication abortion will disproportionately limit the reproductive health options available to Black and low-income people. Consistent with its efforts to secure equal access to health care, LDF has a strong interest in ensuring continued access to safe abortion care.

SUMMARY OF THE ARGUMENT

More than twenty years ago, the FDA approved the drug mifepristone as safe and effective for the medical termination of pregnancy. A regimen of mifepristone, followed by misoprostol, is an FDA-approved protocol for medication abortion. Medication abortions account for majority of all abortions in the United States. Given the severe consequences of both undermining precedent and restricting access to medication abortion, the Fifth Circuit's partial denial of FDA's motion for stay was incorrect for three reasons.

First, the ruling serves to impede access to a safe and effective form of abortion care despite *Dobbs* reserving the issue of abortion to the states. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring) (noting that states that allow abortion may continue to do so, and that all states "may evaluate the competing interests and decide how to address this consequential issue."). This is especially true here as the Fifth Circuit's Order impacts abortion access in states which have sought to safeguard abortion access, and in states where access is permitted subject to state restrictions.

Second, by enjoining several FDA actions that allow greater access to mifepristone, the Fifth Circuit failed to consider that these actions have created substantial reliance interests. In doing so, the Fifth Circuit ignored the challenges many pregnant people face in accessing in-person abortion care, including increased travel times to clinics, increased wait times at those clinics, and increased costs. These challenges disproportionately harm Black and low-income pregnant people.

Finally, the Fifth Circuit's order is contrary to the public's interest. The availability of mifepristone plays a significant role in easing abortion access, and suspending the FDA's actions from 2016 onwards for mifepristone will significantly impede abortion access. This is especially true for the majority of Black Americans, who live in southern and midwestern states that have passed the most restrictive abortion laws since *Dobbs*. With the most common method of abortion further limited, the challenges to accessing abortion care only compound for Black and low-income pregnant people.

For these reasons, we respectfully urge this Court to stay the district court's order.

ARGUMENT

I. THE FIFTH CIRCUIT'S ORDER SEVERELY RESTRICTS ABORTION IN STATES WHERE IT REMAINS LEGAL

Since 2000, the FDA has permitted the use of mifepristone in a two-drug regimen for medication abortion. More recently, the FDA has approved mifepristone as part of the medication abortion protocol up to 10 weeks after a person's last menstrual period, removed the in-person dispensing requirement, allowed healthcare providers other than physicians to prescribe mifepristone, among other changes.[3] Mifepristone has been widely used safely and effectively to terminate early pregnancies for millions of patients. The Fifth Circuit's order limits access to

[3] *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, U.S. Food & Drug Admin. (Jan. 4, 2023) https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/questions-and-answers-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.

mifepristone nationwide. *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 23-10362 (5th Cir. Apr. 12, 2023) (order partially granting motion to stay district court's order) ("*All. for Hippocratic Med.*"). Absent intervention from this Court, access to mifepristone will be severely restricted, in states that have sought to safeguard abortion access, and in states where access is permitted subject to state restrictions.

Because the Fifth Circuit's order will impact the availability of mifepristone in all 50 states, it is contrary to the minimal assurances provided for in *Dobbs*. Justice Kavanaugh's concurrence emphasized that the *Dobbs* decision does not prevent abortion care in the states which have permitted abortion access; and that all states "may evaluate the competing interests and decide how to address this consequential issue." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2305 (2022) (Kavanaugh, J., concurring).

The vast majority of states and the District of Columbia, which have sought to safeguard abortion access for their residents, filed an *amicus* brief in support of the FDA at the Fifth Circuit, *see* Brief for the States of New York, et al. as Amici Curiae in Support of Appellants' Application for a Stay, *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 23-10362 (5th Cir. Apr. 11, 2023), ECF No. 52-1, and several of these states are also plaintiffs in *Washington v. United States Food & Drug Administration*, a case which seeks to remove the excessively burdensome FDA restrictions on mifepristone. Complaint at 3, 127, *Washington v. U.S. Food & Drug*

Admin., No. 1:23-CV-3026-TOR (E.D. Wash. Feb. 23, 2023), ECF No. 1. The plaintiffs in *Washington* argued that:

> As states across the country have moved to criminalize and civilly penalize abortion, the Plaintiff States have preserved the right to access abortion care, and have welcomed people from other states who need abortion care. The extremely limited availability of abortion in other states, and the growing threat to abortion access nationwide, makes patients' access to medication abortion paramount.

Id. at 2.

On the same day the preliminary injunction was granted below, the district court in *Washington* issued an order preliminarily enjoining the FDA from "altering the status quo and rights as it relates to the availability of mifepristone" in the Plaintiff States, a decision that is in significant tension with the district court's order and now the Fifth Circuit's. *Washington v. U.S. Food & Drug Admin.*, No. 1:23-CV-3026-TOR (E.D. Wash. Apr. 7, 2023) (order granting in part plaintiffs' motion for preliminary injunction). The district court in *Washington* clarified that the FDA is prohibited from "altering the status quo and rights as it relates to the availability of Mifepristone under the current operative January 2023 Risk Evaluation and Mitigation Strategy under 21 U.S.C. § 355-1 in Plaintiff States and the District of Columbia." *Washington v. U.S. Food & Drug Admin.*, No. 1:23-CV-3026-TOR, 6 (E.D. Wash. Apr. 13, 2023) (order granting motion for clarification).

Rather than leave it to individual states to determine abortion access as encouraged by Justice Kavanaugh, the Fifth Circuit's order restricts the use of mifepristone in medication abortion care.[4]

II. THE FIFTH CIRCUIT FAILED TO CONSIDER THE RELIANCE INTERESTS OF PEOPLE WHO REQUIRE ACCESS TO SAFE ABORTION CARE

The FDA's 2021 decision removing the in-person dispensing requirement and addition of the pharmacy certification process, and the 2023 modification "'engendered serious reliance interests that must be taken into account.'" *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2120 (2016) (quotation omitted). These actions significantly expanded access to medication abortion—a necessary action, as Black women and other pregnant people face insurmountable state-imposed barriers to procedural abortion, which have created serious reliance interests on expanded access to mifepristone as part of the medication abortion protocol.

The Fifth Circuit failed to consider these interests, and this Court should stay the district court's decision in full.

A. Pregnant Black Women and Other Black Pregnant People Rely on Access to Abortion to Make Decisions Regarding Their Futures

Access to abortion care deeply impacts women's economic and social lives.[5] As the Caitlin Myers and Morgan Welch explain, when women can access abortion it

[4] LDF strongly disagrees with the central holding of *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, notwithstanding the above-referenced statements representing that the decision does not interfere with states' abilities to continue to allow abortion care.

[5] Caitlin Knowles Myers & Morgan Welch, *What Can Economic Research Tell Us About the Effect of Abortion Access on Women's Lives?*, Brookings Inst. (Nov. 30, 2021),

allows them to determine "whether, when and under which circumstances they will become [parents]," a decision which will impact their "marriage patterns, educational attainment, participation in the labor force, and earnings."[6] As discussed below, the availability of mifepristone plays a significant role in easing abortion access for pregnant women and other pregnant people who face barriers to accessing procedural abortion.

Increased abortion access has had a demonstrably positive economic impact on women, and on Black women, in particular. A review of the data from 2020 among states that report racial and ethnic data on abortion patients indicates 39 percent identify as non-Hispanic Black, and among those aged 15-44 there were 24.4 abortions per 1,000 non-Hispanic Black women.[7] When people can decide if, when, how many children to have, and under what circumstances, they are able to make conscious determinations about other aspects of their lives. A literature review conducted by the Institute for Women's Policy Research found that abortion access increased college attainment for women, with "[i]ncreases in postsecondary attainment . . . concentrated among Black women, who had much larger decreases in teen fertility than White women."[8] The same review also found that abortion legalization in the 1970s, following *Roe v. Wade*, led to a 9.6 percent increase in Black

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https://www.brookings.edu/research/what-can-economic-research-tell-us-about-the-effect-of-abortion-access-on-womens-lives/.

[6] *Id*.

[7] Jeff Diamant & Besheer Mohamed, *What the Data Says About Abortion in the U.S.*, Pew Rsch. Ctr. (Jan. 11, 2023), https://www.pewresearch.org/fact-tank/2023/01/11/what-the-data-says-about-abortion-in-the-u-s-2/.

[8] Inst. for Women's Pol'y Rsch., *The Economic Effects of Abortion Access: A Review of the Evidence* 2 (2019), https://iwpr.org/wp-content/uploads/2020/07/B377_Abortion-Access-Fact-Sheet_final.pdf.

women's college graduation rate[9] and that abortion access resulted in a 6.9 percent increase in Black women's labor market participation rate, which was three times higher than the corresponding rate for women generally (2 percent).[10]

Further, abortion access may alleviate labor market problems faced disproportionately by Black women. For example, women in states with better reproductive health care face less occupational segregation, increased job mobility, and increased access to non-wage benefits such as paid sick days and leave, as well as promotional opportunities.[11] These impacts compound over generations: children born to women with abortion access had lower rates of poverty, were more likely to graduate college, and were less likely to receive public assistance as adults.[12]

In view of these strong reliance interests, this court must grant the FDA's request for a stay.

B. State Laws Restricting Abortion Access Have Created Strong Reliance Interests in the Availability of Mifepristone

Under the FDA's 2021's exercise of enforcement discretion, and its 2023 modification of the REMs,[13] many pregnant women and other pregnant people now

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[9] *Id.* (citing Joshua D. Angrist & William N. Evans, *Schooling and Labor Market Consequences of the 1970 State Abortion Reforms*, 18 Rsch. Lab. Econ. 75 (2000)).
[10] *Id.* (citing David E. Kalist, *Abortion and Female Labor Force Participation: Evidence Prior to Roe v. Wade*, 25 J. Lab. Rsch. 503 (2004)).
[11] *See* Kate Bahn et al., *Linking Reproductive Health Care Access to Labor Market Opportunities for Women*, Ctr. for Am. Progress (Nov. 21, 2017), https://www.americanprogress.org/issues/women/reports/2017/11/21/442653/linking-reproductive-health-care-access-labor-market-opportunities-women.
[12] Inst. for Women's Pol'y Rsch., *supra* note 8, at 2 (citing Jonathan Gruber et al., *Abortion Legalization and Child Living Circumstances: Who Is the 'Marginal Child'?*, 114 Q. J. Econ. 263 (1999) and Elizabeth Oltmans Ananat et al., *Abortion and Selection*, 91 Rev. Econ. & Stat. 124 (2009)).
[13] *Questions and Answers on Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, *supra* note 3.

rely upon telehealth and the ability to access mifepristone outside of abortion clinics.[14] The FDA's removal of the in-person disbursement requirement ensures pregnant women and other pregnant people are afforded greater safety, privacy, and autonomy. These reliance interests are intensified for those with extremely limited access to facility-based abortion care, including people of color, people living with low incomes, and people in rural communities. The Fifth Circuit failed to take these reliance interests into account.

To be sure, between 1973 and 2022, states passed nearly 1,400 restrictions to abortion access, many necessitating multi-day appointments several hours away from home.[15] The Supreme Court's ruling in *Dobbs v. Jackson Women's Health* has led to further strain on access to abortion care, as states have moved to foreclose access altogether. According to #WeCount, an abortion reporting effort, North Carolina saw a 37 percent increase in the number of abortions performed; Kansas, 36 percent; and Colorado, 33 percent from April 2022 through August 2022.[16] As one study noted, "[l]aws that closed local abortion clinics forced people to travel long

[14] During COVID-19 professional organizations issued statements endorsing telehealth and non-test approaches for abortion care to maintain social distancing, and some independent providers adopted telehealth methods which allowed for social distancing. Ushma D. Upadhyay et al., *Adoption of No-Test and Telehealth Medication Abortion Care Among Independent Abortion Providers in Response to COVID-19*, Contraception (Nov. 20, 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7718446/.
[15] *See* Elizabeth Nash & Lauren Cross, *2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, Guttmacher Inst. (June 14, 2021), https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades.
[16] Soc'y of Family Planning, #*WeCount Report* 3 (2022), https://tinyurl.com/3wuermmy.

distances for care and state-mandated waiting periods added travel costs, and lost wages due to time off work."[17]

This strain on patients and clinics has exacerbated the reliance on medication abortion, as pregnant women and other pregnant people must travel further for procedural abortion. As of December 2022, 40 percent of abortion clinics open in the United States were only scheduling appointments via medication abortion.[18] And, while the FDA lifted the in-person dispensing requirements and permitted the mailing of medication abortion, some conflicting state laws make it more challenging for patients in those states to access medication abortion through these means.[19] While misoprostol alone can be used safely and effectively for early pregnancy termination, but it may result in more or longer side effects such as diarrhea, fever and chills, and ongoing pregnancy is more likely after misoprostol-only treatment.[20]

Finally, Black pregnant people and other pregnant people often rely upon medication abortion because of their "experiences of being low-income, uninsured, experiencing sudden economic instability, and living paycheck-to-paycheck."[21] Indeed, the Supreme Court recognized nearly 50 years ago that travel is prohibitive

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[17] Dana M. Johnson et al., *The Economic Context of Pursuing Online Medication Abortion in the United States*, SSM - Qualitative Rsch. Health, Dec. 2021, at 1, 4.
[18] Amelia Thomson-DeVeaux, *A Texas Judge's Decision Could Reduce Abortion Access . . . Again*, FiveThirtyEight (Apr. 7, 2023), https://fivethirtyeight.com/features/mifepristone-ruling-abortion-access/.
[19] Pien Huang & Mara Gordon, *Telehealth Abortion Demand Is Soaring. But Access May Come Down to Where You Live*, NPR (May 20, 2022), https://www.npr.org/sections/health-shots/2022/05/20/1099179361/telehealth-abortions-are-simple-and-private-but-restricted-in-many-states.
[20] Elizabeth G. Raymond et al., *Medication Abortion with Misoprostol-Only: A Sample Protocol*, Contraception, Feb. 25, 2023, at 1, 2, https://www.contraceptionjournal.org/article/S0010-7824(23)00060-4/fulltext; *The Availability and Use of Medication Abortion*, KFF (Feb. 24, 2023), https://www.kff.org/womens-health-policy/fact-sheet/the-availability-and-use-of-medication-abortion/.
[21] Johnson et al., *supra* note 17, at 3.

to accessing abortion care, emphasizing that the petitioner in *Roe v. Wade* "could not afford to travel . . . in order to secure a legal abortion under safe conditions." 410 U.S. 113, 120 (1973). And, again, the Court recognized that "the burdens of . . . increased travel would fall disproportionately on poor women, who are least able to absorb them." *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103, 2130 (2020). These onerous requirements for patients and providers have erected near-insurmountable barriers to clinic-based abortion care for people with limited economic resources and time.

In view of these realities, a stay is proper because the Fifth Circuit did not give serious consideration to these significant reliance interests.

III. THE PUBLIC INTEREST IS NOT SUPPORTED BY THE FIFTH CIRCUIT'S ORDER

The Fifth Circuit's order is contrary to the public interest and this Court must grant a stay of the district court's order in its entirety.

A. The Fifth Circuit Did Not Consider the Real-World Impact of Restricting Abortion Care

As the FDA explains in its stay application, the Fifth Circuit's decision would immediately disrupt access to mifepristone. FDA Stay App. at 38. For example, remaining doses would be misbranded, the generic version of the drug would not be approved, and the branded version could not be marketed until the FDA and drug sponsor take efforts to comply with the legal regime required by the lower court, which would take months. *Id.* Without expanded access to mifepristone as allowed by the 2016 authorization, and subsequent FDA decisions, many pregnant people will be unable to access abortion care at all. The Fifth Circuit noted that "the world

operated under the 2000 Approval for sixteen years, apparently without problems." *All. for Hippocratic Med.* at 37. However, it did not seriously consider the impact its order would have upon vulnerable groups, especially Black women and other pregnant people with respect to the 2016 and later FDA actions. Black pregnant women and other pregnant people who seek abortion care, do so in order to exert their autonomy and agency over their reproductive lives in their best interest, as well as that of their families.[22] As the FDA makes plain its application, removing the availability of mifepristone will remove an option that may be best for many patients due to medical reasons, a desire for privacy, or due to past trauma. FDA Stay App. at 39.

The financial consequences of abortion denial can be severe. One study revealed that individuals who were denied abortions were four times more likely to have household incomes below the federal poverty level and were more likely to report being unable to afford basic necessities.[23] A 2020 working paper found that abortion denial corresponds with a 78 percent increase in the amount of overdue debt and an 81 percent increase in negative public records, including bankruptcy and eviction.[24] The researchers observed:

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[22] *See* Reva B. Siegel et al., *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 42 Colum. J. Gender & L. 67, 91 (2022) (noting that laws that protect reproductive freedom "to determine what is best for themselves, their families, and their communities.")

[23] 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. Pub. Health 407, 410–12 (2018); Advancing New Standards in Reproductive Health, Bixby Ctr. for Glob. Reproductive Health, *Turnaway Study*, www.ansirh.org/sites/default/files/publications/files/tur naway_study_brief_web.pdf (last visited Apr. 10, 2023) [hereinafter *Turnaway Study*].

[24] Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion* 3 (Nat'l Bureau of Econ.

> [T]he impact of being denied an abortion on collections is as large as the effect of being evicted and the impact on unpaid bills is several times larger than the effect of losing health insurance. Although imprecisely estimated in our setting, it appears that denying a woman an abortion reduces her credit score by more than the impact of a health shock resulting in a hospitalization or being exposed to high levels of flooding following Hurricane Harvey.[25]

Thus, the significant real-world social and economic costs of reducing access to medication abortion, which could result in denying abortion access to many pregnant Black women and other pregnant people, weigh strongly in favor of granting FDA's request for a stay.

B. Restricting Access to Mifepristone Exacerbates Inequities in Abortion Care for Black Pregnant Women and Other Pregnant People

Due to systemic racism and discrimination, Black women and Black people generally, including those who can become pregnant, have faced inequities in their ability to access essential health care, including abortion care.[26] The Fifth Circuit's refusal to stay the district court's order and suspending the FDA's approval of mifepristone from 2016 onwards will exacerbate existing racial and economic inequities in access to abortion care. Cementing inequities along racial and economic lines undermines any conceivable interest in the public good.

Rsch., Working Paper No. 26662, 2020), https://www.nber.org/system/files/working_papers/w26662/w26662.pdf. Notably, this working paper drew on data collected in the *Turnaway Study*, *supra* note 22.

[25] Miller et al., *supra* note 24, at 29 (internal citations omitted).

[26] *See* Cynthia Prather et al., *Racism, African American Women, and Their Sexual and Reproductive Health: A Review of Historical and Contemporary Evidence and Implications for Health Equity*, 2 Health Equity 249 (2018).

In the past several years, medication abortion use has increased from 40 percent in 2018, to 44 percent in 2019 up to 53 percent in 2020.[27] Thus, 2020 was the first time that medication abortion was the predominant method of abortion care in the United States.

However, the number of abortions provided by health care providers sharply declined post-*Dobbs*. Abortion access in the United States has been on shifting sands ever since the *Dobbs* decision, 142 S. Ct. 228. For example, from April 2022 through August 2022, there was a 95 percent decrease in the number of abortions by provider in states that banned or severely restricted access to abortion, and there was a 32 percent decrease in the number of abortions by providers in states that restricted abortion access. Should the Fifth Circuit's order stand, there will be additional chaos and confusion for Black pregnant women and other pregnant people, as well as health care providers around what kind care is legal and where, which will have real world impacts for abortion and miscarriage care.[28]

Southern and midwestern states, where the majority of Black Americans live, have passed the most restrictive abortion laws post-*Dobbs*.[29] Most abortions are now

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[27] Diamant & Mohamed, *supra* note 7.

[28] Pretreatment with mifepristone followed by misoprostol has been found to result in a "higher likelihood of prompt and effective treatment of early pregnancy loss than misoprostol use alone." Courtney A. Schreiber et al., *Mifepristone Pretreatment for the Medical Management of Early Pregnancy Loss*, 378 N. Engl. J. Med. 2161, 2169 (2018); *see also* Justin J. Chu et al., *Mifepristone and Misoprostol Versus Misoprostol Alone for the Management of Missed Miscarriage (MifeMiso): A Randomised, Double-Blind, Placebo Controlled Trial*, 396 Lancent 770 (2020). Misoprostol is only available to health care providers in the United States consistent with the restrictions on mifepristone. *See* Mara Gordon & Sarah McCammon, *A Drug That Eases Miscarriages Is Difficult for Women to Get*, NPR (Jan. 10, 2019), https://www.npr.org/sections/health-shots/2019/01/10/666957368/a-drug-that-eases-miscarriages-is-difficult-for-women-to-get.

[29] Liza Fuentes, *Inequity in US Abortion Rights and Access: The End of Roe Is Deepening Existing Divides*, Guttmacher Institute, (Jan. 17, 2023), https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides.

banned in over 10 states, and seven other states severely limit access to abortion care.[30] In the 100 days immediately after *Dobbs*, 66 abortion clinics in the United States, across 15 southern and midwestern states, stopped providing abortion care, leading to an even greater abortion care desert in communities than existed before.[31] The proportion of Black women abortion seekers pre-*Dobbs* was greater in states that now have extreme abortion bans or restrictions, like Georgia, Alabama, Tennessee, Arkansas and Mississippi.[32]

Access to abortion care can also be limited based on a lack of access to insurance coverage. Thirteen percent of Black women ages 15-49 have no health insurance compared to 8 percent of white women.[33] Black women of reproductive age face the biggest disparity in insurance coverage.[34] Because the Hyde Amendment prohibits federal funding of most abortions, and many states restrict private insurers from covering abortion services, pregnant women and other pregnant people seeking abortion care need to find the resources to cover the out-of-pocket costs for care in addition to travel related costs, and because many are already parents, they must also arrange for childcare expenses.[35] Because many pregnant Black women and

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[30] Sarah Knight et al., *Here's Where Abortions Are Now Banned Or Severely Restricted*, NPR (Mar. 31, 2023), https://www.npr.org/sections/health-shots/2022/06/24/1107126432/abortion-bans-supreme-court-roe-v-wade.

[31] *See* Fuentes, *supra* note 29.

[32] Taylor Jackson & Kelsey Butler, *Abortion Desert in the US South Is Hurting Black Women the Most*, Bloomberg (Aug. 23, 2022), https://www.bloomberg.com/news/articles/2022-08-23/black-women-are-hardest-hit-by-abortion-restrictions-sweeping-the-deep-south?leadSource=uverify%20wall.

[33] Fuentes, *supra* note 29.

[34] Nat'l Partnership for Women and Families, *Fact Sheet: Black Women Experience Pervasive Disparities in Access to Health Insurance* (2019), https://www.nationalpartnership.org/our-work/resources/health-care/black-womens-health-insurance-coverage.pdf.

[35] *See* Ushma D. Upadhyay et al., *Trends in Self-Pay Charges and Insurance Acceptance for Abortion in the United States, 2017-20*, 41 Health Affs. 507, 507, 513–14 (2022).

other pregnant people seeking abortion care will need to pay out of pocket due to lack of insurance access or restrictions on using insurance for services, they may be forced to forego payment of bills and other necessary expenses in order to afford abortion care.[36] For pregnant Black women and other pregnant people living on low incomes navigating a more limited landscape for abortion care could pose an insurmountable burden to accessing abortion care.[37] The landscape is already shifting in light of the Fifth Circuit's order with some telehealth practices switching solely to providing misoprostol, while others wait to see what will happen as this case proceeds, threatening access for thousands of women and other people.[38]

In the years immediately following the *Roe* decision, Justice Marshall observed the disparities in abortion access and specifically noted that the denial of federal funding for abortion care was tantamount to the denial of a legal abortion for indigent women. *Harris v. McRae*, 448 U.S. 297, 338 (1980) (Marshall, J., dissenting). He noted that "nonwhite women obtain abortions at nearly double the rate of whites," and that access to abortion care was made more challenging for indigent women, a majority of whom are people of color. *Id.* at 343. In the forty-three years since *Roe*, and with no federal constitutional right to abortion post-*Dobbs*, pregnant Black women, other pregnant Black people, and indigent pregnant people of color continue to have the

[36] *See* Sarah C.M. Roberts et al., *Out-of Pocket Costs and Insurance Coverage for Abortion in the United States,* 24 Women's Health Issues e211, e217 (2014).
[37] *See* Upadhyay et al., *supra* note 35, at 514.
[38] Julia Harte & Sharon Bernstein, *Some US Abortion Pill Providers Curb Availability After Appeals Court Ruling*, Reuters (Apr. 13, 2023), https://www.reuters.com/legal/some-us-abortion-pill-providers-curb-availability-after-appeals-court-ruling-2023-04-13/.

greatest challenges in accessing abortion care because of systemic racism and economic injustice.

CONCLUSION

For the foregoing reasons, this Court should immediately stay the district court's order and also grant an immediate administrative stay while it considers the parties' applications.

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