

US federal judge hears anti-abortion zealots' arguments for nationwide ban on abortion pill

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Federal Judge Matthew Kacsmaryk heard arguments Wednesday from anti-abortion groups seeking an injunction ordering the US Food and Drug Administration (FDA) to withdraw its more than two-decades-old approval of the abortion pill mifepristone, removing access to the medication across the country in an unprecedented case which would effectively ban most abortions.

Mifepristone is taken along with misoprostol for a safe and effective medical abortion and is responsible for the majority of abortions in the country. Both drugs are on the World Health Organization's Essential Medicines List, meaning the organization has determined them critical for meeting the needs of a health care system.

According to the *New York Times*, Judge Kacsmaryk "said he would decide as soon as possible whether to issue a preliminary injunction that could, at least temporarily, take the pill, mifepristone, off the market."

Kacsmaryk, a Trump appointee, heralds from the same reactionary crowd as the bigots filing the case, having previously worked as a counsel for the right-wing anti-abortion outfit First Liberty Institute, as previously reported here by the WWS.

The plaintiffs were represented by the Alliance Defending Freedom (ADF), a far-right evangelical organization which opposes democratic rights for LGBTQ individuals and works to impose Christian practices in public schools in addition to fighting to outlaw abortion. The ADF has been designated by the Southern Poverty Law Center as a hate group and was involved in the Mississippi case overturning *Roe v. Wade* last year.

There is a question of whether the plaintiffs have legal standing to bring the lawsuit. The FDA and mifepristone distributor Danco Laboratories argued that

the plaintiffs have no standing given their claimed harm was several steps removed from the approval of the drug.

Erin Morrow Hawley, a lawyer for the ADF, is the wife of ultra-right Republican Senator Josh Hawley of Missouri. She argued that doctors among the plaintiffs had "suffered concrete harm" because providing abortions for women required them to divert medical resources from other patients, and it required them to act against their morals by providing a follow-up surgery after an incomplete abortion. The complainants are effectively asking for the government to establish their religious beliefs as law, violating the separation of church and state contained in the First Amendment to the US Constitution.

This was in fact argued by the plaintiffs, who claimed that mifepristone was not treating a disease and therefore could not be approved under Subpart H of FDA regulation that allows for approval of drugs "that have been studied for their safety and effectiveness in treating serious or life-threatening illnesses."

Erik Baptist, one of the plaintiffs' lawyers, argued "pregnancy is not an illness." A Justice Department lawyer, Daniel Schwei, countered that pregnancy "can be life-threatening" for some and that the term "illness" used at the time is appropriate for both diseases and conditions.

The lawyers for the plaintiffs also called for a return to "Comstockery," claiming the FDA decision violated the 1873 Comstock Act, which included wide-reaching censorship and violations of constitutional rights, including the First and Fourth amendments.

The plaintiffs also argue that mifepristone is unsafe. Their arguments are not based on science and are aimed at providing a scientific facade to essentially religious arguments. As we previously wrote, "mifepristone's

safety has already been settled. As *Bloomberg* previously reported in February 2022, mifepristone ‘sends fewer people to the ER than Tylenol or Viagra.’ The two-pill method is 96 percent to 98 percent effective at ending early pregnancies.”

FDA and Danco lawyers cited years of studies showing complications are rare and that hospitalization is needed in less than 1 percent of the time. Addressing the claims that chemical abortion causes “cramping, heavy bleeding and severe pain,” the defendants cited that these are normal consequences of terminating a pregnancy.

The argument by the plaintiffs is made further ridiculous considering, as a lawyer representing the FDA noted, the agency’s approval “did not require anyone to prescribe or take mifepristone” and said that “it simply said we are giving our stamp that mifepristone is safe and effective.”

The *Times* reports that Kacsmatyk took some “unusual steps” leading up to the hearing, including asking the parties in the case to “to keep quiet about the fact that a hearing had been scheduled and told them he planned to delay making the public aware of it and would only enter it into the public court record the evening before.” As the *Times* explains, “The federal government generally objects to closed hearings unless they are necessary to protect national security interests.”

The explanation Kacsmatyk gave in transcripts of the calls with the parties’ lawyers obtained by the *Times* was that he wanted to avoid an “unnecessary circus-like atmosphere” that would supposedly disrupt the lawyers’ presentations in court. He also claimed that the court staff had faced death threats and that the injunction was for security.

Kacsmatyk stated he would delay disclosing the hearing date until Tuesday night and that the case would be on Wednesday morning, asking lawyers to keep the information secret “as a courtesy,” withholding from issuing a gag order which would legally bar participants from sharing the information. Apparently a document from the case docket was sealed in connection to the meeting, according to people familiar with the case speaking to the *Times*.

As the *Times* wrote, while the court said it would provide seating for the public and press, the judge’s “plan to provide little advance notice seemed likely to

have the practical effect of minimizing the number of people who would attend.”

Essentially, the “unusual steps” were made out of fear of an explosion of public outrage in response to the latest attack on the right to abortion. The vast majority of the American population supports abortion and are disgusted at the essentially conspiratorial efforts by a tiny minority of religious bigots to further restrict access to it and to attack democratic rights more broadly.



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