

Texas judge issues injunction barring most common abortion drug

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In a sweeping and unprecedented action that seeks to substitute religious doctrine for science, a federal district judge in Texas has overturned the 23-year-old FDA approval of the abortion drug mifepristone and issued a nationwide injunction against its sale and distribution. The court order is a reactionary attack on democratic rights that highlights the turn by large sections of the US ruling class to fascistic and dictatorial methods of rule.

Mifepristone is used in most chemical abortions in the United States, which accounted for 54 percent of all abortions nationwide, according to the Guttmacher Institute. An estimated 500,000 women a year take it in combination with a second drug, misoprostol, in a regimen that is both highly effective and very safe. The drug is reportedly safer than many over-the-counter medicines, including Tylenol, and routinely prescribed drugs like penicillin.

In the wake of the reactionary Supreme Court decision in *Dobbs v. Jackson Women's Health*, which overturned *Roe v. Wade*, anti-abortion and Christian fundamentalist groups have stepped up their attack on democratic rights by seeking to restrict or prohibit outright the use of this prescription drug.

This has involved scrapping the pretense, in which the Supreme Court majority joined, that the goal of the campaign to repeal *Roe* was to return abortion decisions to the states, allowing each state, rather than the federal government, to set standards for the medical procedure. Judge Matthew Kacsmaryk, the sole judge in a small federal district in northern Texas, issued an injunction purporting to overturn the FDA approval and outlaw mifepristone everywhere in the United States.

Kacsmaryk stayed the effect of his ruling for one week, to give the Biden administration time to appeal for an emergency ruling from the Fifth Circuit Court of Appeals, perhaps the most conservative of all the appeals courts.

The immediate effect of the injunction could be limited further by a contrary injunction issued by a federal district judge in Spokane, Washington, upholding the suit brought by attorneys-general in 12 states and the District of Columbia, seeking to block any disruption in the supply of mifepristone. The ruling by Judge Thomas Rice, issued about the same time as Kacsmaryk's, has narrower legal effect, however, since it applies only to those states that had filed suit.

Ultimately, the Supreme Court would decide the conflict between lower court rulings, with the 6–3 majority in the *Dobbs* case likely to seize on any opportunity to expand the attack on

women's reproductive freedoms and democratic rights.

Kacsmaryk was chosen as the legal point man by the anti-abortion campaign. He was a Trump appointee who himself worked as a general counsel for Christian fundamentalist and "right-to-life" groups. He has been an outspoken religious bigot, denouncing gay and transgendered people as "disordered," and—as expressed in his ruling—refusing to use the word "fetus," referring instead to "unborn human" and "unborn person" throughout the 67-page diatribe.

The legal stratagem for obtaining this ruling itself speaks to its anti-democratic character. Right-wing forces seeking judicial backing to impose their unpopular views have developed the technique of "judge-shopping," making use of the fact that Texas has a large number of small, largely rural judicial divisions, sub-units of the district court, where only one or two judges are assigned, as opposed to a large urban district with dozens of judges.

Any civil suit filed in the division of the federal district court in Amarillo, Texas, for example, will be heard by Kacsmaryk. He has issued rulings on an array of issues pushed by the ultra-right, including blocking a Biden administration plan to end Trump's "remain in Mexico" policy, which barred asylum seekers from crossing the US border to file their claims, outlawing a federal program that allowed teenagers to get free contraceptives without parental consent, and stripping LGBTQ people of protection against workplace discrimination.

Other federal judges in Texas have been enlisted in such campaigns. Last week, Judge Reed O'Connor, the only judge in the Wichita Falls division of the Northern District of Texas, issued a ruling striking down a provision of the Affordable Care Act requiring preventive care services to be provided without co-pays or deductibles. These provisions were challenged by the Steven Hotze, owner of a "wellness" center who argued that providing free anti-HIV drugs would "facilitate behaviors such as homosexual sodomy, prostitution, and intravenous drug use—all of which are contrary to Dr. Hotze's sincere religious beliefs."

O'Connor wrote that forcing health plans to cover such anti-HIV drugs without co-pays or deductibles would infringe on their religious freedom because they "believe that (1) the Bible is 'the authoritative and inerrant word of God,' [and] (2) the 'Bible condemns sexual activity outside marriage between one man and one woman, including homosexual conduct.'"

Other such cases filed with one-judge courts include a challenge

to other federal immigration rules, and one, filed by Texas Attorney General Ken Paxton, to declare unconstitutional the entire \$1.7 trillion omnibus spending bill signed by Biden in December. That suit, if successful, could force a partial shutdown of the federal government.

It is not inconceivable that a lawsuit could be brought before a Texas judge to declare the entire 2020 presidential election invalid. Paxton sought such a ruling in 2020 in a suit filed directly with the Supreme Court and backed by 25 other Republican attorneys-general and many congressional Republicans. At that time, the Supreme Court rejected the suit.

In the mifepristone case, the Alliance Defending Freedom, a right-wing fundamentalist group, brought suit on behalf of several groups of Christian doctors opposed to abortion. The suit was filed only last summer, in the wake of the *Dobbs* decision, which suggested that a lower court ruling against mifepristone might ultimately be upheld by the Supreme Court. The ADF then set up the Alliance for Hippocratic Medicine, a group of doctors supposedly based in Amarillo, to ensure that the suit would be filed in Kacsmaryk's division of the court.

Ordinarily, the case would have been thrown out of court at the first go-round, as the doctors did not have standing, since they had not been injured by approval and distribution of the abortion drug. But Kacsmaryk enthusiastically embraced the bogus claim that the doctors had potential injury because "adverse events from chemical abortion drugs can overwhelm the medical system and place 'enormous pressure and stress' on doctors during emergencies and complications." No such "adverse events" have ever been reported.

Kacsmaryk's ruling is written not as a legal document, but as an anti-abortion manifesto. He declares that mifepristone "ultimately starves the unborn human until death," and calls the overall procedure "a two-step drug regimen: mifepristone to kill the unborn human, followed by misoprostol to induce cramping and contractions to expel the unborn human from the mother's womb."

The FDA recently expanded access to mifepristone by allowing its mail order. The ADF claimed that under the 1873 Comstock Act, an anti-obscenity law that has become a byword for Victorian prudery, mailing of any medicine used for abortion was illegal. Kacsmaryk agreed, writing that the plaintiff had "substantial likelihood of prevailing on their claim that defendants' decision to allow the dispensing of chemical abortion drugs through mail violates unambiguous federal criminal law."

Such a reading of the Comstock Act could do far more than prohibit patients from getting mifepristone by mail. According to a legal analysis published in *Slate*, "Absent the narrowing construction applied by the federal circuit courts, the law's plain terms could effectively ban all abortion nationwide because almost every pill, instrument or other item used in an abortion clinic or by a virtual abortion provider moves through the mail or an express carrier at some point."

In other words, if resurrected from the legal scrap heap, the law would become a nationwide prohibition of abortion of every kind.

The Comstock Act is notorious for its sex-obsessed language, prohibiting, for example, "every obscene, lewd, lascivious,

indecent, filthy or vile article, matter, thing, device or substance," including "every article or thing designed, adapted or intended for producing abortion." It is so sweeping that it could apply to contraceptives

The ruling also opens the door to other legal challenges of other drugs that are targeted by the fascist and religious right, including vaccines. Anti-vax fanatic Robert F. Kennedy Jr. has already indicated he intends to file a lawsuit against vaccines citing the Kacsmaryk opinion.

The Biden administration will appeal the ruling but sent clear signals that it privately welcomes the opportunity to use abortion rights as a means of gaining electoral support despite its right-wing policies on every other political issue. A White House statement declared, "But let's be clear—the only way to stop those who are committed to taking away women's rights and freedoms in every state is to elect a Congress who will pass a law restoring *Roe* versus *Wade*."

This call to vote Democratic (in November 2024!) was echoed by Senate Majority Leader Charles Schumer, who indicated that he will stage a series of show votes to "put the Republicans on the record." These will be votes on bills that cannot pass, because of the filibuster rule in the Senate and the Republican control of the House of Representatives.

Schumer told reporters Saturday, "The American people will see for themselves the stark contrast between Democrats who are relentlessly fighting for women's rights, to make decisions about their own bodies and MAGA Republicans who will stop at virtually nothing to enact a national abortion ban with no exceptions."

In other words, under conditions of mass disaffection from the policies of the Biden administration, above all on the war with Russia in Ukraine, the Democrats will seek to use the issue of abortion rights to give themselves a "left" fig leaf while in fact doing nothing meaningful to defend basic democratic rights.



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