Appeals court sides with lower court attack on abortion pills, but delays its effects

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A three-judge panel of a federal appeals court issued a ruling Wednesday night largely upholding the legal basis of the lower court decision banning the most widely used abortion pill, mifepristone, but staying the most sweeping action, which would have overturned the approval of the pill by the Food and Drug Administration (FDA) in 2000.

Pending appeals to the full Fifth Circuit court and to the US Supreme Court—already filed by both sides in the case, the US Department of Justice and several Christian fundamentalist groups—the effect of the appeals court ruling is to significantly limit the distribution of mifepristone but not halt it altogether.

Women who want access to the drug must now make three visits to the doctor rather than one; they can get a prescription up to seven weeks gestational age for the fetus, rather than 10 weeks; and they can no longer receive the drug through the mail or without a doctor's prescription.

The 42-page opinion appears written through gritted teeth, as though two of the three appellate court judges wanted to uphold the ban on mifepristone issued by District Court Judge Matthew Kacsmaryk but were swayed by concerns that it could touch off an explosive political backlash.

They were also responding to the concerns voiced by pharmaceutical and bio-technology companies that a decision by a lone federal judge overturning FDA approval of a drug 23 years ago would disrupt the entire process of gaining approval from the agency for new drugs and vaccines.

The two judges in the majority were appointed by Trump. The third judge, appointed by George W. Bush, argued for a broader stay, blocking any overturn of FDA rules until the case is fully adjudicated.

The panel's opinion constantly uses the language of the right-to-life movement, referring to a fetus of any age as an unborn child, describing mifepristone as "chemical abortion," and declining to recognize any rights of the woman in the initial stages of pregnancy to personal autonomy and the ability to make her own decisions about whether to carry the pregnancy to term.

The split decision on the stay was accomplished by acknowledging one, and only one, procedural defect in Kacsmaryk's ruling, his declaration that the lawsuit by the groups of anti-abortion doctors did not violate the statute of limitations although it was filed 23 years after the initial 2000 FDA ruling, and seven years after a 2016 FDA action modifying that ruling.

On all other legal issues, the panel sided with the plaintiffs, ruling that they had standing to sue, because of a supposed injury they would suffer in the rare event of complications from the use of the abortion pill, which could send patients to the emergency room and thus contribute to stress on the medical system.

All FDA actions not covered by the statute of limitations, including recent actions to expand distribution of the drug by allowing it to be sent through the mail, for example, or with a single doctor's visit rather than three, or up to 10 weeks of pregnancy, rather than seven, are stayed.

The opinion suggests that the judges expect the entire FDA approval to be thrown out by the full appeals court or the Supreme Court, but were unwilling to do so on an emergency review. They describe their decision not to overturn the 2000 FDA approval of mifepristone as "a close call."

Later they disparaged the FDA's own procedures as an "ostrich's-head-in-the-sand approach." In general, they did not hesitate to substitute their own assessments, based on no scientific or medical training, for the decisions of the educated professionals at the

FDA.

Some of the arguments in the opinion seem perverse. The panel found that the FDA could not claim an irreparable injury requiring a stay, because it was not speaking for the pregnant women who would be compelled to forego use of the abortion pill, but only for itself as an agency of the federal government.

The judges went on to embrace the barbaric and outmoded Victorian-era Comstock Act, enacted by Congress in 1873 to bar the shipment of "indecent" materials through the mail or by commercial carrier (rail and truck, now expanded to include air). The law has not been repealed by Congress over the course of 150 years, although it has been rendered moot by many subsequent congressional actions, for instance, regulating the distribution of contraceptives.

The manufacturer of mifespristone, Danco Inc., could not complain that it would be put out of business if the drug was barred by law, the judges declared. "If the Comstock Act is strictly understood," they wrote, "there is no public interest in the perpetuation of illegality."

Emergency actions by either the full appeals court or the Supreme Court could alter the legal landscape for the abortion pill from day to day.

Meanwhile, reactionary state governments continue to take actions denying women the right to the basic democratic right to abortion.

On Wednesday, the Republican-controlled Florida state legislature completed final passage of a bill to ban abortion after six weeks of pregnancy—before most women even know they are pregnant. This would lower the state's current restriction on abortion from 15 weeks. Ultra-right Governor Ron DeSantis has pledged to sign the bill into law, and will undoubtedly make it a public spectacle to further his expected campaign for the Republican presidential nomination.

In Nebraska, where the state currently has the most liberal abortion law in its region, permitting women to terminate a pregnancy up to 21 weeks, the unicameral state legislature is taking up a bill to cut that to six weeks. Republican state senator Steve Erdman argued in debate Wednesday that abortion was responsible for the current stagnation in population numbers and the influx of immigrants into the state.

"Our state population has not grown except by those foreigners who have moved here or refugees who have been placed here," he declared. The 200,000 abortions in Nebraska over recent decades destroyed future US citizens who "could be working and filling some of those positions that we have vacancies."

No Republican legislator expressed any concern over Erdman's remarks, echoing the fascist "Great Replacement" theory, which claims that there is a conspiracy by "elites" (usually Jews) to replace the white population of the United States with immigrants from Latin America, Asia and Africa.