

Legal landscape around abortion medications

Report by Robin Strauss, NYC

April 16, 2023 meeting of the National Mobilization for Reproductive Justice

The vicious and egregious assault being waged on abortion rights, reproductive autonomy, and bodily autonomy here in the US continues with the latest battleground being self-managed abortion and the issue of Mifepristone --more commonly known as the abortion pill. As far as we know right now, nationwide access to Mifepristone, one of the two pills involved in a medication abortion will be preserved through at least Wednesday of this week after the Supreme Court on Friday temporarily blocked a ruling from a federal judge in Texas to ban its use. Since Friday April 7 we have seen legal and political wrangling of the many courts involved in this current warfare. Trying to follow and process the implications (political, medical, etc..) has been difficult, confusing, and enraging but I am going to try to untangle some of it for us today and offer some highlights that I think may be useful in following the situation.

- In November 2022, a group of anti-abortion petitioners, including doctors, shopped around for a federal judge to remove the widely used drug mifepristone -- commonly known as the abortion pill. They claimed the drug, Mifepristone, failed to satisfy rigorous scientific standards. The truth however is that the drug is very safe and because of its safety, since 2016, the FDA has made access to Mifepristone much easier to obtain. The petitioners “found” Judge Matthew Kacsmaryk, in Amarillo, Texas to do their bidding. He is the only federal judge in Amarillo, Texas. All federal cases go to him. In finding this judge, the anti-abortion movement attempted to bypass the voters and the will of the majority in this country that support abortion rights by having an unelected judge chip away at abortion access most notably in states that permit and protect abortion access.
- A word about this judge, Matthew Kacsmaryk. He has deep ties to the anti-abortion movement. He uses inflammatory, and I would say violent language -- calling abortion providers abortionists and the procedures of abortion as killing or starving the unborn human until death. His language assigns personhood to fetuses and embryos.

•

7-day overview

- Last Friday, on April 7, Kacsmaryk invalidated the FDA approval of mifepristone, threatening access to the most common abortion pill in the country. He stayed his own decision for seven days, giving the federal government time to appeal. Otherwise it would have been taken off the market. The Justice Department quickly appealed that decision which ultimately put the case in front of the Supreme Court.
- An hour or so after Kacsmaryk’s ruling came down, Judge Thomas Rice, a federal judge in Spokane, Washington, ruled that federal officials could not hinder access to mifepristone in at least 17 states and Washington, DC while a different lawsuit plays out over the abortion pill. That case involves a suit brought about by a group of Democratic state attorney generals to maintain the drug’s availability on the grounds that the FDA cannot alter the status quo related to the availability of mifepristone. Judge Rice reiterated that the FDA has to comply with his order regardless of the decisions from Kacsmaryk or the 5th Circuit Appeals court in the other case.

- These two orders are in direct conflict, which is probably why the case was expedited to the Supreme Court. The impact of the Texas case would only be felt in states that permit abortion -- making access harder. The Washington case would protect the status quo in the 17 states and Washington DC, that joined the litigation, assuming the FDA complies with the order. The FDA could exercise enforcement discretion and could protect the status quo everywhere.
- The Justice Department first appealed Kacsmaryk's decision to the Fifth Circuit Court of Appeals, located in Louisiana. This court said the drug could stay on the market, but only granted partial access to the medication and left some restrictions in place – shortening permitted use of the pill from ten gestational weeks to seven weeks and denying access through the mail. Basically, they rolled back some of the restrictions that existed prior to 2016.
- On Wednesday, April 12, the DOJ asked the Supreme Court to weigh in on the abortion pill case after the Fifth Circuit Court of Appeals only granted partial access and restrictions.
- The Supreme Court ruled this past Friday, April 14, to temporarily block the Texas ruling but only until Wednesday, April 19. [On April 21, the Supreme Court again blocked bans on mifepristone, but left the case in the hands of the 5th U.S. Circuit Court of Appeals, which has scheduled oral arguments in the case for May 17.]

Some Important History

- Medication abortion has been available in the US since 2000 with FDA approval. This drug, used in combination with another, misoprostol, can be taken in one's home-not in a clinical setting. There were decades of study that showed the medication to be effective and safe-- some medical experts saying safer than Tylenol. By 2020, medication abortion accounted for more than half of all abortions in the US. Since the *Dobbs* decision that threw out *Roe v. Wade*, states across the country have banned or restricted medication abortion.
- Between 2016 and 2023-- The FDA lifted restrictions that had previously prevented patients from obtaining medication abortion pills from a retail certified pharmacy. In essence, they made the pill easier to access, with an increase in self-management-- or greater, reproductive autonomy. After *Dobbs*, though, in states that had banned or restricted abortions, there were also restrictions or bans on use of the abortion pill. Individuals have not been able to obtain the medication at a pharmacy in states with nearly a total abortion ban. In other states the medication provision has been limited solely to physicians. Despite safe use of the drug up to 10 weeks gestational age, some states have limited the gestational age. Some states require that a physician be present during the administering of the drug which then prohibits telemedicine.
- There's no mistake about this, this latest attack is a political assault on reproductive justice masquerading as a medical/scientific claim-- saying the drug is unsafe-- with holes in its science even though there were 54 months of review that deemed it safe and effective. The drug was not rushed to the market while the reviews were taking place.

You must wonder, if the drug was so unsafe, what took the petitioners and the courts 23 years to ban it. My guess is that they were waiting for *Dobbs*. In the *Dobbs* decision, Alito made the case to ban Roe based on claims that were unscientific, manipulated history, ignored precedent, and were filled with extreme right-wing ideology. It ignored the will of the majority of people in this country who support the right to abortion and reproductive autonomy. This current assault in the Texas case, is a continuation of what *Dobbs* started -- a call by right-wing extremists to ban abortion in every state and for working people and poor people to relinquish their basic human rights to reproductive and bodily autonomy. And the assaults are not going to stop.

- Banning abortion and denying reproductive justice is an economic issue that can't be overlooked. Amidst all this legal wrangling, Nebraska last week moved to ban most abortions in the state. Senator Steve Erdman, a white supremacist, argued that abortion had caused slow population growth in the state over the last half century and had hurt Nebraskans economically. "Our state population has not grown except by those foreigners who have moved here or refugees who have been placed here." Referring to embryos he says, "We've killed 200,000 people. If abortion was illegal that would have resulted in more people who could be working and filling the positions. In other words, we need to build a labor and adoption supply chain of working people to continue putting profits into the hands of the ruling class." More and more we are seeing how right-wing extremism, theories of white supremacy, and "replacement theory" are being used to justify bans on abortion. We saw this during the Nazi Holocaust as well.

Other implications

- Mifepristone used with misoprostol can be up to 99.6% effective. By itself, misoprostol's effectiveness is anywhere from 84% to 96%. Taking misoprostol alone can cause more intense side effects -- so much for concerns about safety. Mifepristone is used for other medical situations such as miscarriage, management of labor and delivery. The ban on mifepristone is an assault on a broader range of reproductive rights including the right to safe childbirth, the right to protect women who choose to give birth and who need medical care when miscarriage is a threat.
- If mifepristone is revoked, access to it would not be cut off nationwide but anyone involved in manufacturing or distributing it could face legal risk. The FDA has broad authority over enforcement and could choose not to act against companies that sell or distribute it.
- A victory for the ban of mifepristone could open the floodgates to other legal challenges to vaccines or other essential medications disputed by certain groups.