

# Contradictory Court Opinions Leave the Approval of Abortion Medication in Question

Article By:

Daniel S. Zinsmaster

Bryan L. Cockroft

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On April 7, 2023, two federal judges in Texas and Washington State issued dueling opinions about the abortion medication Mifepristone, just hours apart. These two decisions come in the midst of growing tension about abortion laws in the United States after the *Dobbs v. Jackson Women's Health Organization* decision released by the Supreme Court in 2022.<sup>[i]</sup> The Texas and Washington court opinions do not help reduce the confusion among healthcare providers and residents of the United States. The dueling opinions offer competing viewpoints on the legality of Mifepristone—one of the two abortion-inducing drugs in the United States—and throw into flux the authority of the Food and Drug Administration (the “FDA”) to approve medications for abortion.

U.S. District Court Judge Matthew Kacsmaryk from Texas opined that Mifepristone was improperly approved by the FDA in 2000.<sup>[ii]</sup> Judge Kacsmaryk stated that there was a substantial likelihood that the groups challenging the FDA's approval would prevail on the merits and that the FDA exceeded its authority when they approved Mifepristone. Judge Kacsmaryk issued a nationwide injunction pausing the FDA's approval of Mifepristone, putting his decision on hold for seven days to allow for an appeal by President Joe Biden's administration to the Fifth Circuit. Those appeals are currently working their way through the court system.

On the other end of the spectrum, U.S. District Court Judge Thomas O. Rice issued a ruling that blocks the FDA from “altering the status quo and rights as it relates to the availability of Mifepristone.”<sup>[iii]</sup> This ruling effects 17 states and the District of Columbia.<sup>[iv]</sup>

The Texas opinion was set to go into place on April 14, 2023, but the Justice Department appealed the decision to the U.S. Court of Appeals for the Fifth Circuit on the night of April 7, 2023. The U.S. Fifth Circuit Court of Appeals blocked the part of Judge Kacsmaryk's order suspending the FDA's approval of Mifepristone, but left in place the part of Judge Kacsmaryk's order invalidating the FDA's conditions of drug use. Justice Samuel Alito of the U.S. Supreme Court issued an administrative stay which keeps the status quo on the approval and conditions of use of Mifepristone. Justice Alito has put Judge Kacsmaryk's order on hold until April 19, 2023 until 11:59 p.m. and ordered challengers to respond by noon on April 18, 2023. In the 17 states plus the District of Columbia that fall under the Washington court decision, it is believed that Judge Rice's opinion will allow these states to continue

using Mifepristone in the short term, even though the Texas opinion put in place a nationwide injunction. The Justice Department says it is reviewing the decision in Washington.

So, what happens next? President Biden's administration is continuing to fight the Texas court's ruling. The President issued the following statement, "[the] Court in this case has substituted its judgment for the FDA, the expert agency that approves drugs. If this ruling were to stand, then there will be virtually no prescription, approved by the FDA that would be safe from these kinds of political, ideological attacks." In the meantime, some people such as New York Representative Alexandria Ocasio-Cortez, have gone as far to suggest that the Biden administration should use its "enforcement discretion," and ignore the Texas court's decision entirely. Additionally, on April 10, 2023, members of the House of Representatives introduced a bill that would affirm the FDA has the final say approving drugs used for an abortion, though it is unlikely the bill has any chance of passing both houses of Congress. The appeals process is expected to continue to move swiftly, but as of now, the status quo remains the same and Mifepristone is still approved for use.

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## FOOTNOTES

[i] [www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](http://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf)

[ii]

[https://storage.courtlistener.com/recap/gov.uscourts.txnd.370067/gov.uscourts.txnd.370067.137.0\\_11.pdf](https://storage.courtlistener.com/recap/gov.uscourts.txnd.370067/gov.uscourts.txnd.370067.137.0_11.pdf)

[iii] <https://www.documentcloud.org/documents/23746135-read-federal-judge-in-washington-state-says-fda-cannot-withdraw-mifepristone>

[iv] Washington, Oregon, Arizona, Colorado, Connecticut, Delaware, Illinois, Michigan, Nevada, New Mexico, Rhode Island, Vermont, District of Columbia, Hawaii, Maine, Maryland, Minnesota, and Pennsylvania.