WLP Files Brief to U.S. Supreme Court Supporting FDA in Medication Abortion/Mifepristone Case

The amicus brief, filed on behalf of Professors David S. Cohen and Rachel Rebouché, advances new arguments in critical abortion rights and access case

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PENNSYLVANIA – February 2, 2024: Women's Law Project attorneys filed an *amicus* brief on behalf of Professors David S. Cohen and Rachel Rebouché with the U.S. Supreme Court in *Food and Drug Administration v. Alliance for Hippocratic Medicine*, the case that could determine the future of mifepristone, the first drug taken in a common medication abortion protocol.

The brief supports the FDA's argument that the challengers lack standing to sue in the case. Most of the focus of the case so far has been on whether the challengers have suffered any injury. This brief agrees they have not, but also argues the challengers are off base for other reasons.

Specifically, the brief argues that the challengers lack standing because they have failed to show that their claimed injuries are a result of the FDA and also that they are not redressable by the lower court's order. The brief demonstrates this in by explaining that many other people make decisions that lead to the supposed injury -- mainly, abortion providers and patients. And that the relief the challengers seek would not be made any better if they won their case; in fact, it would likely be made worse.

"In other words, you can't sue over a fantastical harm that would be made worse by the supposed relief that you are actively requesting from the Court," **said David S. Cohen, constitutional law professor at Drexel Kline School of Law.** "The legal verbiage makes it sound complicated but the law, and our argument regarding why the antiabortion doctors should be denied standing, is common sense."

The antiabortion doctors claim that having to treat patients who they speculate may arrive at the emergency room after initiating a medication abortion is an injury. Currently, abortion patients rarely go to an emergency room because medication abortion is safe and effective. The number of such visits, however, could reasonably be expected to increase if the Fifth Circuit reverts to outdated protocols, as sought by the challengers. By reverting to obsolete protocols that reflect outdated medical knowledge that has since been improved upon, the challengers' requested action is likely to increase the alleged harm of having to treat patients who began a medication abortion.

"Redressability cannot be found if the cure is worse than the disease," **said Christine Castro, senior staff attorney at Women's Law Project.** "For example, if the challengers win, the drug label would say the proper dose is 600mg, triple what it is now. It makes zero sense to prescribe more of a drug that the challengers say is so harmful that a federal court must step in."

This is also true in a broader sense, too: If affirming the lower court's order results in fewer people accessing abortion, the antiabortion doctors would be more likely to see more requests for follow-up medical care because continuing a pregnancy poses vastly greater health risks than abortion.

"While attempting to dismantle the nation's system for approving medicine is a new extremist tactic, it reflects a typical anti-abortion strategy of pretending to not want to harm or injure pregnant people

while targeting them with deprivation by proxy," **said Susan J. Frietsche, co-executive director of Women's Law Project.** "They target doctors, so they can't give patients medical care. Laws like SB8 in Texas target a patient's friends and family, hoping to deprive the patient of support. Now they're targeting the FDA, seeking to deprive many kinds of patients of a safe, lifesaving medicine to punish abortion patients. They may be suing the FDA but, as always, the primary targets are people who can get pregnant."

The brief concludes that the U.S. Supreme Court should throw the case out because the challengers lack of standing. Arguments are scheduled at the U.S. Supreme Court on March 26.

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