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For Immediate Release
September 8, 2020

News Release 2020-83

Hawaii Attorney General Joins Effort to Maintain Access to Reproductive Health Care at Supreme Court

HONOLULU – Hawaii Attorney General Clare E. Connors today joined a multistate coalition of 23 attorneys general in supporting legal action against the Food and Drug Administration (FDA) and the U.S. Department of Health and Human Services (HHS) for attempting to increase the risk that women nationwide will contract the coronavirus disease 2019 (COVID-19) as they seek abortions in their state. In an [amicus brief](#) filed in support of the plaintiffs in *FDA et al. v. American College of Obstetricians and Gynecologists et al* in the U.S. Supreme Court, the coalition encourages the court to reject a request from the Trump Administration to halt a preliminary injunction issued by a district court in July and thereby reinstate an FDA requirement that forces women to appear in person in a clinical setting to receive a drug known as mifepristone for an early abortion. The coalition has argued in the past — and continues to argue in today’s amicus brief — that the drug should be readily accessible via telehealth and mail delivery, so as to not potentially expose women to COVID-19 by requiring unnecessary travel.

“During the COVID-19 pandemic, it is unconscionable to subject women to unnecessary in-person contact so they may obtain medication that can be prescribed through telehealth,” said Attorney General Connors. “The federal government should make it easier and safer for women to access healthcare, not more dangerous.”

Since the widespread onset of COVID-19 across the United States in March, more than 6.3 million Americans have contracted the disease, resulting in more than 189,000 deaths, including 9,959 infections in Hawaii and 86 deaths in the state. In response, legislators, officials, and agencies across the nation have been instituting various emergency measures to slow the spread of the virus by limiting face-to-face contact and reducing in-person social gatherings, such as by closing schools and requiring all nonessential employees to work from home, as limiting interpersonal contact is central to the ability of states to control the spread of the virus.

But the FDA's requirements — temporarily halted by a lower court, and the subject of today's amicus brief led by New York Attorney General Letitia James — force patients to appear in person in a clinical setting to receive mifepristone and heighten the risk of contracting and transmitting COVID-19 for everyone involved, including patients and health care providers. Before the pandemic, patients seeking medication abortions represented nearly 40 percent of all abortion patients in the U.S. in 2017. Forcing these women to travel at a time when many states are urging people to limit in-person contacts to curb the spread of COVID-19 is shortsighted — not only putting women across the country and their close contacts in harm's way, but also harming the public health more generally. Further, the FDA requirements undermine states' ability to effectively manage the pandemic.

In today's brief, the coalition specifically argues that reinstating and enforcing the FDA requirements during the current public health crisis will harm patient safety and the public interest in *at least* two ways: 1) by conditioning access to essential reproductive health care on an increased risk of virus infection and transmission and 2) by undermining the states' ongoing efforts to manage the crisis through measures limiting unnecessary in-person contacts, such as stay-at-home orders, stay-safe orders, and telehealth. The states have already effectively utilized such measures to control the spread of the virus, and these measures remain necessary to safely reopen communities, allow for essential in-person activities, and maintain health care capacity during the upcoming flu season.

Additionally, the coalition argues that many women will need to travel long distances in order to reach a clinic that dispenses mifepristone, especially if they reside in rural and medically underserved locations, therefore increasing the likelihood of coming into contact with an individual who has contracted COVID-19.

But by using measures like telehealth to reduce unnecessary person-to-person contacts, states can decrease their infection rate, as necessary to safely commence reopening even as the pandemic continues. In fact, the coalition argues that telehealth should be used wherever possible — even as phased reopenings of the states occur — because it 'maximizes the number of capable health care workers' providing necessary medical treatment, while protecting health care staff and patients. And in the context of reproductive care, the counseling required prior to a medication abortion is routinely and safely provided through telehealth in order to reduce in-clinic interactions.

Another division of HHS and one of the FDA's sister agencies — the Centers for Disease Control and Prevention — has advocated for telehealth, advising health care practitioners to use telemedicine "whenever possible" as "the best way to protect patients and staff from COVID-19."

The coalition goes on to highlight that their states have already taken numerous steps to expand the use of telehealth during the current public health crisis, including the suspension of existing statutes and regulations that limit the use of telehealth in order to allow the delivery of regulated services through telehealth to additional patient populations, including especially vulnerable ones. These suspension orders expand the types of practitioners who can use telehealth, the settings in which it can be provided,

the modalities that can be used to deliver telehealth services, and the circumstances under which telehealth can be initiated. Further, many states have also suspended rules that prohibit telehealth in the absence of an existing patient-provider relationship so that patients can receive care from new providers.

The American College of Obstetricians and Gynecologists — a plaintiff in this case — has championed telehealth as an effective substitute for in-clinic dispensing of mifepristone that can improve patient safety and outcomes during the COVID-19 public health crisis. And even before the pandemic, in 2018, the American Medical Association passed a resolution urging the FDA to lift the requirement.

In 2000, the prescription drug mifepristone — sometimes referred to as RU-486 — became the first FDA-approved medication to induce medication abortions, and today still remains the only drug approved in the United States for pregnancy termination. Women take mifepristone along with another drug to bring about an early-term abortion. Since its approval, three million women in the United States have used the medication. According to the FDA, this medication “has been increasingly used as its efficacy and safety have become well-established by both research and experience.” Women alternatively may undergo a procedural abortion that is performed by aspiration or by dilation and evacuation.

Today’s amicus brief follows up on two previous amicus briefs filed in this case by a coalition of states led by Attorney General James — in the [U.S. District Court for the District for Maryland](#) and the [U.S. Court of Appeals for the Fourth Circuit](#) — asking the district court to issue a preliminary injunction of the FDA requirements for mifepristone, and asking the circuit court to deny the Trump Administration’s efforts to stay the preliminary injunction. The courts have continued to rule in favor of the plaintiffs and the coalition of attorneys general.

Joining Attorneys General Connors and James in filing this amicus brief are the attorneys general of California, Colorado, Connecticut, Delaware, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia.

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