

## **Abortion Laws Do Not Always Require Health Exceptions, Appeals Panel Rules**

By Dave Andrusko

In a decision that remains largely under the radar, a federal appeals court has rejected a key weapon in the pro-abortion legal arsenal. On February 24, the U.S. 6th Circuit Court of Appeals said that U.S. District Judge Susan Dlott had erred when she concluded that every law which regulates abortion must contain a general health and life exception.

Writing for a three-member panel, Judge David McKeague said that “close scrutiny of the case law reveals that no such blanket requirement has been imposed.” The panel also held that lower courts may not strike down entire statutes when a narrower ruling is possible, citing the Supreme Court’s unanimous decision recently handed down in *Ayotte*.

Legal commentators from all perspectives have tried to read the tea leaves in *Ayotte*. Many speculated that one result might be that pro-abortionists would not be able to just waltz into court, conjure up a “parade of horrors” concerning the law’s alleged effect on maternal life or health, and have the law stricken in its entirety prior to it ever going into effect. Likewise, the speculation has been that courts might also be unwilling to gut a law in its entirety if, when it takes effect, only a portion of the law proves to be in conflict with Supreme Court rulings.

However, while rejecting what is called a “per se” requirement [Judge Dlott’s determination that every abortion statute must have life and health exceptions], the panel did find Dlott’s alternative basis for invalidating the Ohio law at issue persuasive—that plaintiffs were likely to succeed on the merits because substantial medical evidence had been presented that there could be a significant risk to at least some women’s health or lives in certain circumstances, if they were not allowed to have a chemically-induced abortion, the two-drug RU486 abortion technique.

“There are some circumstances in which the surgical option is considerably more risky for some women,” wrote Judge McKeague, who was joined by judges Karen Nelson Moore and John Rogers in the 3–0 decision. The implication is that if these specific circumstances were taken into account, the statute would be constitutional. Thus the result of the panel’s action was to vacate in part Dlott’s ruling and “remand for consideration of the appropriate scope of injunctive relief in light of the United States Supreme Court’s recent decision in *Ayotte v. Planned Parenthood of Northern New England*.”

Ohio Attorney General Jim Petro said he welcomed the chance to return to Judge Dlott to argue in favor of a “sensible and mainstream state law.” He told the Cincinnati Inquirer that the law is designed to protect women from a potentially dangerous drug.

“We believe the state has a right and a duty to protect the health of Ohio citizens,” Petro said in a statement.

At issue in *Planned Parenthood Cincinnati Region v. Taft* is the “off-label” use of RU486, which the state of Ohio tried to prevent by passing a law in 2004. Some background into the history of the introduction of RU486 is needed.

In 2000, after examining the results of its tests, the Food and Drug Administration (FDA) approved the manufacture and use of mifepristone (RU486) for use in the United States. The FDA concluded its use was safe up through 49 days’ gestation.

Pro-abortionists began pushing the envelope almost immediately. The so-called “Schaff protocol” is

recommended by the National Abortion Federation and Planned Parenthood and “has come to be widely employed across the United States,” according to Judge McKeague.

Named after Eric Schaff, whose research primarily led to its development, the protocol makes two dramatic changes.

It lowers the amount of mifepristone/RU486 and increases the amount of the prostaglandin (misoprostol) used with RU486 to induce contractions to expel the dead baby. And the span in which the two-drug technique can be used is expanded from 49 days to 63 days.

Once a drug is FDA-approved, doctors may prescribe it in dosages other than those expressly approved and for other indications—known as “off-label” use—absent state regulation. Ohio’s legislators stepped in to close this loophole.

They “concluded that the FDA had only approved one specific protocol for the administration of mifepristone because that was the only safe and effective protocol,” McKeague wrote. “Therefore, they banned all other uses of mifepristone to protect Ohio women from unsafe and ineffective mifepristone protocols.”

The legislation was scheduled to go into effect September 23, 2004. However, two abortionists and various Planned Parenthood chapters in Ohio sued to stop the ban from taking effect, and Judge Dlott barred its enforcement.

The panel’s opinion was carefully written and traced both what was said in a whole series of Supreme Court decisions and “The Supreme Court’s application of the health or life exception requirements,” according to Judge McKeague. (Emphasis in the original.) The latter “further undermines the slender textual support for a per se requirement.”

McKeague then surveyed how other federal courts have addressed the question, concluding, “Neither can support for a per se requirement be found in any of the case from other circuits cited in the [plaintiffs’] briefs.”