No. 22A902

# In the Supreme Court of the United States

FOOD AND DRUG ADMINISTRATION, ET AL.,
*Applicants,*
*v.*
ALLIANCE FOR HIPPOCRATIC MEDICINE

*ON APPLICATION TO STAY THE ORDER ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS AND FOR AN ADMINSTRATIVE STAY*

## BRIEF *AMICUS CURIAE* BY GENBIOPRO, INC. IN SUPPORT OF APPLICANTS AND ADMINISTRATIVE STAY


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## INTERESTS OF *AMICUS CURIAE*[1]

GenBioPro, Inc. holds the FDA-approved Abbreviated New Drug Application ("ANDA") for generic mifepristone. GenBioPro's *only* products are generic mifepristone and misoprostol, which together make up the FDA-approved two-drug regimen for medication abortions. Sales of the two drugs are essentially the company's sole source of product revenue. GenBioPro was founded on the belief that all people—regardless of income, race, or geography—have a right to reproductive health care, including access to medical abortion. And as the sole generic manufacturer of mifepristone in the United States, GenBioPro has a special interest in ensuring access to reproductive health care to the patients and communities it serves.

[1] Pursuant to Supreme Court Rule 37.6, GenBioPro affirms that no counsel for a party authored this brief in whole or in part, that no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than GenBioPro or its counsel made such a monetary contribution.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

GenBioPro is the only supplier of generic mifepristone in the United States. It currently supplies approximately two-thirds of the mifepristone used domestically for medication abortions.

The Fifth Circuit's partial stay of the District Court's order leaves the FDA's initial 2000 approval of branded mifepristone ("Mifeprex") in place. But although GenBioPro was never made a party to this action—and although all parties agree that GenBioPro's product is chemically identical to the Danco product that was the subject of the 2000 approval—the Fifth Circuit allowed the remainder of the District Court's order, including a purported "stay" of the approval of GenBioPro's product, to remain in place. The end result is that an order by a single district court has purported to "stay" the years-old approval of the equivalent product of a company that was not even made a party before it. While Mifeprex remains an approved drug, generic mifepristone somehow does not. Plaintiffs' counsel touted in a press release that the Fifth Circuit "agreed with Alliance Defending Freedom attorneys that the FDA's approval of generic mifepristone was unlawful, and *that the manufacturer must cease production by Friday*." Alliance Defending Freedom, *Fifth Circuit Ends FDA's Illegal Mail-Order Abortion Regime* (Apr. 13, 2023), https://bit.ly/416BsJ5 ("ADF Press Release") (emphasis added).

That result is legally unjustifiable. The *only* legal theory Plaintiffs have ever advanced in this litigation concerning GenBioPro's generic approval is that, under well-established federal law, it must stand or fall together with the original 2000 approval. Indeed, the Fifth Circuit's Order itself takes the position that GenBioPro's

2019 generic approval "*is entirely dependent on the underlying 2000 Approval*." Order, *All. For Hippocratic Med. et al. v. FDA et al.*, No. 23-10362, ECF 183-2 at 32 (5th Cir. Apr. 12, 2023) ("Fifth Circuit Order") (emphasis added). Yet, while the original approval of Danco's Mifeprex remains on the market, the Fifth Circuit refused to accord the same status to FDA's derivative approval of GenBioPro's generic mifepristone. The Fifth Circuit reached this paradoxical result despite barely mentioning GenBioPro's 2019 ANDA approval—and never analyzing Plaintiffs' likelihood of succeeding on their purely derivative claims to invalidate it—in its entire 42-page opinion.

That result makes no sense; it is clear and obvious legal error; and it is already wreaking havoc for GenBioPro, throwing the marketplace into disarray, and creating massive confusion in the public health communities that depend on its product and the thousands of people who will be denied the safe and effective treatment GenBioPro's product provides. For these reasons and the other compelling reasons offered by the applicants, the Court should immediately stay the District Court's unprecedented order in its entirety.

## FACTUAL BACKGROUND

### I. FDA Has Always Treated GenBioPro's Generic Mifepristone as Identical to Danco's Mifeprex

In 1984, Congress amended the Federal Food, Drug, and Cosmetic Act ("FDCA") to expand access to affordable generic drugs by reducing barriers to generic market entry. Those amendments—commonly known as the Hatch-Waxman Amendments—created the modern generic drug industry. *See PLIVA v. Mensing*,

564 U.S. 604, 626 (2011). While brand companies seeking to market a novel drug product must submit New Drug Applications based on multi-phase clinical trial programs, *see id.* at 612, drug companies seeking to market generic versions of previously-approved drugs may file abbreviated applications that demonstrate the product's pharmaceutical and therapeutic equivalence to a previously approved drug product. *Id.* at 612-13. It was under this framework that GenBioPro brought its generic version of mifepristone—the only generic mifepristone—to market after spending more than a decade developing its bioequivalent medication.

In approving GenBioPro's application, FDA explicitly determined GenBioPro's generic mifepristone "to be bioequivalent and, therefore therapeutically equivalent to the reference listed drug (RLD), Mifeprex Tablets, 200 mg of Danco Laboratories, LLC." U.S. Food & Drug Admin., ANDA Approval Letter for Mifepristone Tablets, 200 mg, ANDA No. 091178 (Apr. 11, 2019), https://bit.ly/3o1lCRd. As the FDCA requires, GenBioPro's generic mifepristone and Danco's Mifeprex have labels that are identical in every meaningful respect, again in recognition of the fact that they are "bioequivalent" and have "the same therapeutic effect" and thus have the same benefits and risks. *See* 21 U.S.C. § 355(j)(2)(A)(iv)–(v), (j)(4)(F)–(G); *Mutual Pharmaceutical Co. Inc. v. Bartlett*, 570 U.S. 472, 476-77 (2013)

As set forth in the approval letter, FDA similarly subjected GenBioPro's generic mifepristone to the precisely same distribution and administration conditions (known as a "Risk Evaluation and Mitigation Strategy" or REMS) as Danco's product, released in a single, unified document, the "Mifepristone REMS Program." U.S. Food

& Drug Admin., ANDA Approval Letter for Mifepristone Tablets, 200 mg, ANDA No. 091178 (Apr. 11, 2019), https://bit.ly/3o1lCRd. FDA has continued to treat GenBioPro's generic mifepristone as identical to Danco's Mifeprex by applying each iteration of the REMS with equal force to GenBioPro's mifepristone. *See generally* U.S Food & Drug Admin., *Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, http://bit.ly/41usBjY (last accessed Apr. 13, 2023).

The scientific basis for the approval of the Danco NDA and the GenBioPro ANDA is thus identical, and they are rated by FDA as substitutable at the pharmacy level. The extent of their approval, the contents of their labeling, and the detailed restrictions on how the products can and cannot be distributed, prescribed, and used are identical. As such, GenBioPro understood its interest would be adequately protected by the agency that approved the drug or the manufacturer of the chemically identical branded drug on whose NDA GenBioPro's ANDA relies.

## II. The Parties, District Court, and Fifth Circuit Have Treated GenBioPro's Generic Mifepristone as Identical to Danco's Mifeprex

The parties, the District Court, and the Court of Appeals have also treated the branded and generic products as chemically identical and subject to precisely the same set of FDA requirements and restrictions.

The only basis to set aside the 2019 ANDA that Plaintiffs offered at the District Court preliminary injunction hearing is "because the underlying approval upon which [the ANDA] relied" was unlawful. Hr'g on Pls. Mot. for Prelim. Inj. Tr., *All. for Hippocratic Med.*, No. 2:22-cv-00223-z (N.D. Tex. Mar. 15, 2023) at 55:12–21 ("[F]or

the challenge to the 2019 ANDA, again, set it aside or vacate it, because it was in violation of the law, because the underlying approval upon which it relied" was unlawful). That was consistent with Plaintiffs' complaint where Plaintiffs relied on the fact that FDA approves an ANDA if the drug is shown to be chemically identical to an approved drug. *See* Complaint, *All. for Hippocratic Med. et al. v. FDA et al.*, No. 2:22-cv-00223-z (N.D. Tex. Nov. 18, 2022) ("Compl."), ECF 1 at ¶¶ 87-88 ("FFDCA allows a generic drug manufacturer to submit an abbreviated new drug application (ANDA) for approval to introduce into commerce and distribute a generic version of an approved drug."). *See also* Pls. Prelim. Inj. Brief, *All. for Hippocratic Med. et al. v. FDA et al.*, No. 2:22-cv-00223-z (N.D. Tex. Nov. 18, 2022) ("*AHM* Brief"), ECF 7 at 5, 21–22 ("FDA approved GenBioPro, Inc.'s abbreviated new drug application for a generic version of mifepristone, relying on Mifeprex's safety data … GenBioPro's generic version of mifepristone has the same labeling and postmarketing restrictions as does Danco's Mifeprex."). Nor did Plaintiffs ever offer any additional grounds for invalidating GenBioPro's approval in any advocacy to FDA; in fact, they never raised their challenge to GenBioPro's approval with FDA at all.

The record below further establishes that the parties and District Court agreed that GenBioPro's generic mifepristone ANDA is bioequivalent to Danco's Mifeprex NDA and thus the two should be treated equally. In fact, Plaintiffs' claim for relief relied on just such treatment. *See* Compl. ¶ 224 ("FDA determined GenBioPro's Mifepristone … to be bioequivalent and, therefore, therapeutically equivalent to the reference listed drug (RLD), Mifeprex"); *AHM Brief,* ECF 7 at 5, 21–22 ("FDA

approved GenBioPro, Inc.'s abbreviated new drug application for a generic version of mifepristone, relying on Mifeprex's safety data … GenBioPro's generic version of mifepristone has the same labeling and postmarketing restrictions as does Danco's Mifeprex.").

The District Court likewise relied upon the fact that the NDA and ANDA products had been deemed the "same" drug by FDA. Critical to its holding that Plaintiffs were likely to succeed on their challenge to the 2019 generic approval was the District Court's explicit conclusion that the two must stand or fall together. *See* Order, *All. for Hippocratic Med. et al. v. FDA et al.*, No. 22-CV-223-Z (N.D. Tex Apr. 7, 2023) ("*AHM District Court* Order") at 60 ("If FDA withdraws the listed drug on which the ANDA-approved generic drug is based, the agency is generally required to withdraw the generic drug as well.") (citing 21 U.S.C. § 355(j)(6); 21 C.F.R. § 314.15).

Consistent with Plaintiffs' legal theory and the District Court's decision, there was absolutely no evidence of any kind, nor any legal argument before the District Court, that the GenBioPro ANDA had any more or less scientific validity than the Danco NDA. Nor did the Plaintiffs or anyone else argue for any differentiation between the two in the stay proceedings before the Fifth Circuit over the course of the last week. And the Fifth Circuit recognized, "[t]o approve a generic version of a previously approved drug, FDA reviews whether an [ANDA] contains information showing that the proposed generic drug is materially the 'same' as the approved drug" and "GenBioPro's generic version of mifepristone has the same labeling and REMS requirements as Danco's Mifeprex." Fifth Circuit Order at 3, 5. And, again, the court

of appeals recognized that GenBioPro's approval is "*entirely dependent on the underlying 2000 Approval"* of Danco's Mifeprex. *Id.* at 32 (emphasis added).

Nevertheless, the Fifth Circuit's Order granted Defendants' requested relief only as to the District Court's "stay" of the original 2000 Approval of Mifeprex; it denied the same relief as to the district court's "stay" of "all" subsequent actions challenged by plaintiffs beginning with the 2016 REMS, including FDA's approval of GenBioPro's ANDA for mifepristone. The end result is that a District Court has "stayed" the approval of a generic drug, even though it is undisputed that the product is identical to the branded drug, which remains approved.

## ARGUMENT

The Fifth Circuit's decision illustrates the essential folly and manifest danger of allowing federal drug approvals to be decided through nationwide injunctions rendered by individual district courts based on the claims of particular private litigants. Instead of a predictable, science-based system that treats chemically identical products alike, and allows the countless participants in a nationwide market to plan their affairs rationally, such an approach yields a haphazard process under which the lawfulness of chemically identical products—and the commercial viability of the companies that make them—can change in the space of a few days based on the decisions of a handful of judges and the vagaries of the litigation tactics of a few private litigants. That is no way to regulate the approval and marketing of drugs to a nationwide market. As this Court recognized in *Mensing* and *Bartlett*, the right to manufacture and distribute generic equivalent drugs rests on the complete identity of the original NDA and ANDA approved products.

As everyone—even Plaintiffs—concede, GenBioPro's ANDA stands on precisely the same footing as Danco's NDA for the chemically identical substance, conferring the same rights and responsibilities as the original NDA for the referenced drug. Yet now, without any individualized factual or legal analysis, the Fifth Circuit's Order appears to distinguish between the lawfulness of distributing chemically identical products. The only possible distinction evident in the Fifth Circuit's Order for such a wholesale revision to the market are that the original 2000 NDA approval is beyond the applicable statute of limitations, whereas a challenge to the 2019 ANDA approval, it concluded, is not. But that distinction would make no sense, as a matter of law or equity. The District Court's sole stated basis for staying the 2019 ANDA approval was the fundamental principle that generics and branded drugs should be treated identically. *AHM* District Court Order at 60. And as the Fifth Circuit recognized, GenBioPro's approval is "entirely dependent on the underlying 2000 Approval." Fifth Circuit Order at 32.

That decision will have devastating consequences for GenBioPro and the distributors, doctors, and patients who will be deprived of its generic product. GenBioPro's sales of combined mifepristone/misoprostol packs, for the FDA-approved two-drug regimen, now represent approximately *two-thirds* of the total of approximately 500,000 medicated abortions annually in the United States.[2] If

[2] According to the most recent information available, in 2020, 53% of the 930,000 abortions in the United States were through medication. *See* Rachel Jones, et al, *Abortion Incidence and Service Availability in the United States, 2020*, 54 Persp. on Sexual & Reprod. Health 128, 136 (Nov. 2022) https://bit.ly/3KC3pBA.

Plaintiffs are correct that GenBioPro "must cease production by Friday," ADF Press Release, the majority of the domestic mifepristone supply will disappear overnight. Plaintiffs' assertion injects uncertainty and chaos into the marketplace. Indeed, customers have voiced significant concerns regarding purchasing in light of the questions the Fifth Circuit decision raises. Thus, unless stayed, the Fifth Circuit decision will create a severe supply disruption. That inevitably affects doctors and their patients who will be unable to find an alternative supply for such an enormous share of the market.

In addition, GenBioPro is completely dependent on the continuation of those mifepristone sales. Mifepristone and misoprostol, which are used together in the FDA-approved two-drug regimen, represent its *only* products. If the District Court's "stay" of its long-approved ANDA remains in effect, its sudden inability to market its sole product will create severe financial and operational distress and threaten GenBioPro's commercial viability.

This litigation represents a dangerous and severely disruptive departure from the norm of reasoned and science-based agency decision-making regarding drug approvals. The Fifth Circuit entered an order that could have the effect of eliminating the sole generic in this market, contrary to Congress' mandate of robust generic competition and with foreseeable affects for both cost and access. If the Fifth Circuit's Order stands, it will pose substantial risks for the stability of federal drug regulation going forward as activists with views contrary to the great weight of mainstream scientific opinion seek out hand-selected judges to undo the decisions of the expert

agency Congress appointed to oversee federal drug approval. And because generic approvals always occur many years after the initial New Drug Application, potential differences in the application of the statute of limitations put generics at far greater risk of disruption. It would be "open season" on the ANDA of any generic product—products which, as a group, were used to fill 91% of all prescriptions in 2021, with a savings of over $370 billion a year. Associations of Accessible Medicines, *The U.S. Generic and Biosimilar Medicines Savings Report* (Sept. 2022) at 3, https://bit.ly/415ydBN.

## CONCLUSION

The Court should stay the District Court's order pending appeal in its entirety, including as applied to GenBioPro's ANDA of mifepristone.

Respectfully submitted.


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