

[Boom! Lawyered: Rapid Reaction—Texas Abortion Ban Takes Effect Immediately](#)

- Imani Gandy: Hello, fellow law nerds! Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that just needs things to stop happening, just for like a day. Can you give us a goddamn break? I'm Imani Gandy.
- Jessica Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary and analysis on the web. And the Team Legal Podcast is part of that mission. So a big thanks to our subscribers and a welcome to our new listeners.
- Imani Gandy: So Jess, I got to get something off my chest here. You know I adore you. I adore working with you, I adore your family, I adore everything about you. And this coronavirus pandemic is a really stressful time, and so I feel like that we really need to take care of ourselves and each other, which is why I have some bad news.
- Jessica Pieklo: Oh, okay.
- Imani Gandy: You're not allowed to take any more time off.
- Jessica Pieklo: I'm sorry, what? Excuse me.
- Imani Gandy: I know.
- Jessica Pieklo: What?
- Imani Gandy: I know. I'm sorry, and it really does pain me to bring this news to you. But last week you took a week off, and then you came back to work and bang, while you were off Texas lost its entire goddamn mind. And then earlier today the Fifth Circuit took a look at Texas and said, hey, that looks fun. We're going to lose our entire goddamn minds as well. I mean, this is like your travel karma where you board a flight and immediately SCOTUS drops a terrible decision, and you're in the air trying to negotiate shitty wifi that you paid \$175 for. I am putting my foot down, Jessica. Enough is enough.
- Jessica Pieklo: All right. First of all, Imani, that's kind of fair.
- Imani Gandy: "To be fair!"
- Jessica Pieklo: I feel like that's really kind of fair because it's only Tuesday and it's been a hell of a week. But second of all, I can't help it that I happened to schedule my one week off a year for the time when Texas conservatives would use the coronavirus pandemic to go ham on abortion rights. That's not my fault.

Imani Gandy: I mean, you say you can't help it, but this just seems to be a pattern. So I feel like maybe this is purposeful, you don't know it. I don't know, something's going on. But why don't we talk about Texas, and Jesus Christ, let's try to figure out what the hell is going there.

Jessica Pieklo: Seriously.

Imani Gandy: So, Texas decided that it would be just swell to use a fricking pandemic to attack abortion rights using arguments that are so ridiculous that it's truly an indictment of the collective brain power of the panel of judges who sit on the Fifth Circuit that overruled a temporary restraining order that stopped Texas from using a fricking pandemic to ban abortion.

Jessica Pieklo: Wait, so Texas banned abortion, a lower court said, nah, you can't do that, and then the Fifth Circuit said, actually, yes you can?

Imani Gandy: That is exactly what happened, and that's what we're going to talk about today. What, and I cannot stress this enough, the actual fuck is going on with Texas and with the Fifth Circuit. I mean, come on people.

Jessica Pieklo: All right, Imani, so what the actual fuck is going on with Texas?

Imani Gandy: Good question, Jess. Good question. So let's get into it. Essentially Texas and a handful of other states are using the corona outbreak as an excuse to ban abortion as a non essential medical procedure. Texas is claiming that abortion providers essentially are wasting hospital resources and using personal protective equipment that healthcare workers fighting the pandemic need to be using. The arguments are absolute nonsense, and we're going to explain why in a minute, but let's go over what has happened so far procedurally.

Jessica Pieklo: So last Monday the 22nd, which feels like four lifetimes ago, but was only a matter of days, Texas Governor Greg Abbott issued an executive order banning all elective surgeries and medical procedures that are not immediately necessary to correct a serious medical condition or to preserve the life of a patient. The order, which is set to expire on April 21st, applies to all licensed healthcare practitioners and facilities. Notably the EO exempts any procedure that if performed in accordance with the commonly accepted standard of clinical practice would not deplete hospital capacity or the personal protective equipment needed to cope with the COVID-19 disaster.

Imani Gandy: The very next day on March 23rd, Attorney General Ken Paxton issued a press release stating that the executive order, the EO -- as we like to call it in the legal business -- applies to any type of abortion, including medication abortion, and threatened criminal penalties, including jail time for those who violate the law.

Jessica Pieklo: Wait, hold up. Medication abortion? But medication abortion doesn't actually deplete hospital capacity or PPE needed to cope with the coronavirus. So medication abortion should be exempt. What am I missing?

Imani Gandy: Of course it should, but this isn't really about conserving resources or containing the virus. It's about banning abortion and controlling the reproductive autonomy of pregnant people.

Jessica Pieklo: Of course it is. Right. So a group of providers filed a lawsuit against Governor Abbott challenging this EO, which I feel like we have to shimmy when we say EO.

Imani Gandy: Got to do a little shimmy. "The EO. Hey, EO." [laughter]

Jessica Pieklo: A group of providers filed a lawsuit challenging the EO as it applies to abortion care, and they're arguing that it's an undue burden on the constitutional right to obtain a pre fetal viability abortion, which, you know what, Imani? It absolutely is.

Imani Gandy: It absolutely is.

Jessica Pieklo: They've asked for a temporary restraining order blocking enforcement of the executive order and they got one.

Imani Gandy: Advocates argued that both surgical and medication abortion are an essential component of comprehensive health care, and a quote "time-sensitive service" for which a delay of several weeks or in some cases days may increase the risk to patients or potentially make it inaccessible. Now in response to that, Texas argued that the ban is only until April 21st, so what's the big deal? It's an absurd argument.

Jessica Pieklo: It is an absurd argument. First of all, people who are pregnant now can't afford to wait until after April 21st to get an abortion. By that point, it may be too late, and for some it's going to be too late. Or it may be too expensive since the farther along a pregnancy is the more expensive abortions become.

Imani Gandy: And second of all, it is highly unlikely that this pandemic is going to be over on April 21st, especially since the ding-dong in the White House has finally stopped his, "we got to reopen the country on Easter, it's tremendous" nonsense, and has set an April 30th- [laughter]

Jessica Pieklo: That Trump, I'm sorry! Imani's Trump impersonation just floored me. I'm dead.

Imani Gandy: I've been working on it. But he tried to claim that we were going to reopen the country on Easter and that's just nonsense. And so now he's changed it to this April 30th deadline, which is also probably going to change since we're still a

couple of weeks away from the peak of this pandemic and no one knows what the fuck is going on.

Jessica Pieklo: Advocates are also arguing that to the extent that Texas is concerned about conserving PPE, there is literally no reason, none whatsoever, to ban medication abortion -- because medication abortion doesn't use PPE. And with surgical abortions, which don't actually involve surgery or anesthesia, providers and assistance you sterile gloves, a gown, a surgical mask and reusable eyewear. They don't use N95 masks, which are the PPE item most effective in preventing coronavirus transmission and which are in short supply.

Imani Gandy: So in response, Texas made some noise about medication abortion frequently resulting in complications requiring surgical intervention and how these complications will lead to pregnant people being admitted into overrun hospitals and taking resources away from COVID-19 patients. Yeah, yeah. Pretty much. Pretty much.

Jessica Pieklo: That's just ridiculous. I mean, it ignores the fact that forcing immunocompromised pregnant people to remain pregnant in and of itself could overrun hospital resources since they are more susceptible to contracting COVID.

Imani Gandy: Also, it is simply not true that medication abortion frequently results in complications.

Jessica Pieklo: And as far as surgical abortions are concerned, those are performed in clinic outpatient facilities. Clinics are not using hospital resources needed for COVID response. No ventilators, hospital beds, hospital staff or supplies are at issue.

Imani Gandy: And now this is rich, so just get ready for your head to explode.

Jessica Pieklo: Super.

Imani Gandy: Texas is also complaining that abortion providers are risking spreading the virus. So, in their response to plaintiff's request for a TRO, they say quote, as plaintiff's state, women travel from other locations to receive abortions at their clinics, and traveling to other parts of the state is exactly what is causing the spread of the virus. And I have to say, whose fucking fault is that!? Texas has these onerous regulations that require multiple unnecessary trips to a provider for counseling and for unnecessary forced ultrasounds. And they have implemented so many absurd regulations that clinics have been forced to close. They've been forced to close as a result of these regulations, which in turn forces patients to travel to other parts of the state, and even sometimes out of state.

Jessica Pieklo: I mean, this is ridiculous. You can't enact burdensome regulations that make it harder for people to access care because they have to travel hundreds of miles, and then turn around and blame pregnant people for potentially spreading the

virus across the state because they are forced to travel hundreds of miles. It's absurd, it's ridiculous, it's bananas, it's bonkers. It's all of this. What are they doing?

Imani Gandy: I also want to point out that advocates for Texas are blaming pregnant people for spreading the virus, but Governor Abbott has yet to issue a shelter in place order. So really it's everyone in Texas that is spreading the virus around. So why are they blaming pregnant people? That is bananas. Moreover, once a shelter in place order is issued, because one is going to have to be issued because this virus is just spreading like wildfire, that is going to result in limited public transit options, it's going to result in limited childcare assistance because childcare facilities are going to have to shut down. So how are pregnant people supposed to make multiple trips to abortion clinics that are hundreds of miles away while negotiating not having a way to get there and not having someone to take care of the kids that they already have while they try to get to a clinic? How is this supposed to work? Make it make sense!

Jessica Pieklo: I can't. I mean that's not even to mention that the unemployment rates have skyrocketed. Over 3 million claims in one week. That means that people have fewer options when it comes to paying for an abortion and those attendant costs that all those extra restrictions add on.

Imani Gandy: And finally, if Texas is really concerned about hospital capacity, they wouldn't be banning abortion at all, because forcing pregnant people to continue pregnancies to term, especially when we don't really know how the coronavirus affects pregnant people, that has a much greater chance of overwhelming Texas' healthcare systems. Since if you're pregnant, you have to go to prenatal care and you have to go to all these appointments. It's just these types of prenatal care, this type of pregnancy care is more of an exhaustion of hospital resources than getting an abortion.

Jessica Pieklo: It totally is. Pregnancies require at least monthly prenatal appointments and additional appointments for ultrasounds and labs. I mean, I remember in both my pregnancies it felt like I was always in front of a doctor getting stuck with something. Each of those appointments requires doctors to use PPE. So this is basically all ridiculous nonsense!

Imani Gandy: So they've basically been trying to ban abortion since the dawn of time, and they're marshaling every daft and disingenuous argument to do so even though these arguments don't make a lick of sense.

Jessica Pieklo: And of course Texas is challenging the provider's standing to sue on behalf of their patients, because of course they are -- the very issue that the Supreme Court is going to decide in June Medical Services later this term.

Imani Gandy: So this lawsuit was filed, Texas filed its response, and United States District Court Judge Lee Yeakel, who's the guy who presided over the HB2 trial in Whole

Woman's Health versus Hellerstedt, that's just a little sidebar, he seemed pretty annoyed by Texas' shenanigans and spit a bit of fire in his order granting the TRO. He said, quote regarding a woman's right to a pre fetal viability abortion, the Supreme Court has spoken clearly there can be no outright ban on such a procedure. The court will not speculate on whether the Supreme Court included a silent, except-in-a-national-emergency clause, in its previous writings on the issue. Got to love that little bit of snark there. Got to love it.

Jessica Pieklo: That's such good shade, and I think the listeners would be interested to know that that's a Republican appointee. Judge Yeakel is a Bush appointee. So I mean, you've got to be pulling some shit to get a Republican appointee to snark like that in an abortion rights decision. All right. So that is fantastic, and it felt so good.

Imani Gandy: Yay. We were so excited!

Jessica Pieklo: For a day. Because of course, Texas appealed to the Fifth Circuit Court of Appeals, which just issued a temporary stay of Yeakel's order. The court set a briefing schedule, which means that from now until Friday at a minimum, abortion is banned in Texas. Friday is when the last brief is due, and we may have a final answer from the Fifth Circuit then as well.

Imani Gandy: And so what do you think that final answer is going to be?

Jessica Pieklo: So this is definitely a case that we need to watch. Knowing the conservative Fifth Circuit and the fact that they are known for going rogue on abortion rights, this is what they do. How many times have you and I had a conversation where it's like, yay, we got a good order. Oh fuck, the Fifth Circuit?

Imani Gandy: Exactly. That's what happened in June Medical Services versus Russo.

Jessica Pieklo: Exactly.

Imani Gandy: When they literally overruled all of the lower court findings, ignored the hours of testimony and decided that, yes huh, Louisiana's admitting privileges law is just hunky dory.

Jessica Pieklo: Precisely.

Imani Gandy: I mean, for Christ's sake.

Jessica Pieklo: So that leads me to believe that the Fifth Circuit is going to allow Texas to ban abortion during this pandemic. I mean, I think that there is something about the argument that Texas is making that this is temporary, it's an emergency situation, that is going to be appealing to those judges. And then we'll have to see if it's appealing to all of the Fifth Circuit.

Imani Gandy: Right. And so the question is, what does this mean for pregnant people in Texas?

Jessica Pieklo: Yeah.

Imani Gandy: So, as of now it means that abortion is banned in Texas pending a ruling from the Fifth Circuit, which we'll probably get next week.

Jessica Pieklo: So banned forever?

Imani Gandy: Well the executive order says until April 21st, but this pandemic is not going to be over by April 21st. So that deadline is going to be continually pushed back and back and back for however long it takes this country to get its shit together and contain this virus.

Jessica Pieklo: Right. And whichever way the Fifth Circuit rules, I expect the losing party is going to appeal either to the full Fifth Circuit or the Supreme Court and asked for a stay of that order as well.

Imani Gandy: And the last time the Fifth Circuit went rogue and provider plaintiffs asked the court for a stay, John Roberts gave them one, remember? That's what happened in June Medical Services versus Russo, which is the admitting privileges case, which we're going to get a ruling on in the middle of a pandemic, which is weird. But we have a podcast episode about John Roberts and that whole kerfuffle, and it was February 18th, 2019. If you want to go listen to that, you should. So maybe we'll get lucky again and John Roberts will put a pause on this nonsense and let this litigation sort of work its way out.

Jessica Pieklo: Yeah. I mean that would really be the conservative approach ironically would be to let the lower court order stay in effect and put the order on pause while the underlying litigation proceeds. So, this is just swell, Imani. Lawmakers are basically using COVID-19 as an excuse to try and ban abortion full stop. And I mean, we've talked a lot about Texas, but it's not just Texas. We've got three other lawsuits that were filed on Monday. Oh my God. I really am not allowed to ever go on vacation again.

Imani Gandy: No, you're not.

Jessica Pieklo: Four lawsuits in one day. But the three others that were filed were in Alabama, Iowa and Oklahoma.

Imani Gandy: And these states are using absolute total canards to ban abortion. They're just using the pandemic as an excuse. This idea that suspending abortion care is going to free up hundreds of hospital beds or other medical equipment is just not true. It's not realistic, and it depends on the public not understanding what abortion care is actually.

Jessica Pieklo: Imani, it reminds me of the arguments around the TRAP laws, like hospital admitting privileges requirements. Because on the surface and to abortion noobs they sound reasonable. Of course we want abortion providers to have admitting privileges at a nearby hospital. Why wouldn't we? It's an argument designed to appeal to logic if you aren't very well versed in the subject. But when you dig into those arguments, the bullshit becomes pretty apparent.

Imani Gandy: Right. The fact that abortion is extremely safe and there are not going to be scores of abortion patients who've had complications flooding hospitals. That's just not something that is going to happen. But, fine. So this is all the worst, but we don't want to leave our listeners out on a ledge. So let's add a little positivity to this nonsense. What can we do about it?

Jessica Pieklo: Well, if you live in a state that hasn't yet declared abortion an essential healthcare procedure that continues during this pandemic, get on the horn, call your governor's office and tell them to do that shit like yesterday.

Imani Gandy: Yeah. Yeah.

Jessica Pieklo: And if you're able to, donate to abortion funds. Now more than ever funds are going to need our support.

Imani Gandy: Yes they will, and it's something you should do. And I know it's a tough time for a lot of people with unemployment, and people being home and wondering how they're going to pay their rent, which is due tomorrow. But whatever you can do, even if it's just signal boosting funds that are looking for money, that's helpful. You should join our Facebook group. I'm sure there are people there who are going to start commiserating about what to do for people who need abortions in Texas now that, at least for a minimum, they're banned through the end of the week, at least. And aside from that, I don't know, it's a good time to just check in with people, take care of one another.

Imani Gandy: It's a really scary time for people. Especially it's a scary time for pregnant people. Especially, especially a scary time for pregnant people who are looking to get an abortion. So, that's going to wrap it up for us this week. If you care about this coverage and our podcast, and again, I know you only have a little bit of disposable income right now, but if you have any, a little, like a penny or two in your pocket, we'd love your help to help us keep this all going.

Jessica Pieklo: If you can, please throw us a couple of bucks to keep us streaming through your ear holes. It will only take a second and really, truly every dollar counts.

Imani Gandy: The link is rewire.news/boomgive. That's rewire.news/B-O-O-M-G-I-V-E.

Jessica Pieklo: And it's also in the show notes in your app.

Imani Gandy: Woo hoo, show notes in your app. Show notes in your app. Okay. I don't know why. I really don't know why. So you should follow me on Twitter if you want to talk about any of this stuff. I'm Angry Black Lady @angryblacklady. Jess is @hegemommy. H-E-G-E-M-O-M-M-Y. Like I said, join our Facebook group, answer the questions. We're going to change them, but just say a little something that lets us know that you're not some anti-choice numpty looking to stir shit up. Just say you like us on Twitter. I don't know. Make a joke. Call Justice Beer Face. Make ping pong ball a funny name, whatever. But, yeah.

Jessica Pieklo: Have we called him Justice Beer Pong? Have we called him Justice Beer Pong though? I don't know. We'll have to go back through the archives.

Imani Gandy: Justice Flip the Cup. Okay. [laughter]

Jessica Pieklo: Justice Flippy Cup. Okay. [laughter]

Imani Gandy: All right, Jess, we got to stop this. What are we going to do?

Jessica Pieklo: Yeah. We'll see you on the tubes, folks.

Imani Gandy: We will see you on the tubes, folks.

Imani Gandy: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. Marc Faletti produces the show.