

[Boom! Lawyered: Arkansas Created a Pandemic Catch-22 to Block Abortions](#)

Imani Gandy: Hello, fellow law nerds! Welcome to another episode of Boom! Lawyered, a Rewire.News podcast, hosted by the legal journalism team that is having naughty thoughts about Tim Kaine. 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: You know what I love about living in these United States of America, Jess?

Jessica Pieklo: Imani, do I really want to know?

Imani Gandy: It's that we're living through a presidency of a highly intelligent and competent individual who has shown immense leadership in this time of crisis and has ensured that every person who needs a coronavirus test can get one at their local McDonald's.

Jessica Pieklo: [shocked] I'm sorry, come again?

Imani Gandy: You heard me, Donald Trump has handled this pandemic response impeccably. Testing is widespread and widely available, so much so, that abortion clinics in Arkansas cannot perform abortions on patients unless they have received a negative COVID-19 test result within 48 hours. This is perfectly reasonable and not at all a bonkers regulation.

Jessica Pieklo: Are you okay? My brain's not accepting any of this.

Imani Gandy: Look, the Arkansas Department of Health issued a directive that requires pregnant patients seeking procedural abortions to obtain a negative COVID-19 test result 48 hours prior to the abortion.

Jessica Pieklo: I'm sorry. I just, I'm apologizing here because I could not have heard you correctly. I think I blacked out or something. Let me see, so did you say that pregnant people in Arkansas can't get procedural abortions unless they have received a negative COVID-19 test within 48 hours?

Imani Gandy: Yep. Yep. It's a mess. It's a mess. And that's what we're going to talk about this episode, Arkansas' efforts to force additional requirements on pregnant patients seeking abortion and the lawsuit brought by Little Rock Family Planning Services to call bullshit on that effort.

Jessica Pieklo: You're going to tell me that the court laughed Arkansas right out of the state, right?

Imani Gandy: You want me to tell you that Arkansas was laughed out of Arkansas?

Jessica Pieklo: I mean, it's the least you could do.

Imani Gandy: Unfortunately, I can't. I can't do that. A federal court this weekend upheld the Arkansas Department of Health's directive.

Jessica Pieklo: Yeah. I don't like this timeline at all.

Imani Gandy: Yeah, neither do I, Jess. Neither do I.

[music]

Jessica Pieklo: Okay, Imani. So can we start off by telling our listeners what we know this pandemic and the Trump administration's response to it, specifically with regards to testing? I think it's important, just so everyone is clear how utterly asinine it is for Arkansas to be demanding that pregnant patients seeking a procedural abortion obtain a negative COVID test 48 hours before getting that abortion.

Imani Gandy: Sure. Let's do it.

Jessica Pieklo: Okay. So in January, the first corona case was confirmed and Trump said, "You know what? Totally under control."

Imani Gandy: In late February, Trump claimed that the U.S. is leading in testing, but reports show only a few thousand tests had been administered at that time.

Jessica Pieklo: In early March, Trump then said this nonsense, "Anybody that needs a test gets a test. They're, there. They have tests and the tests, they're beautiful."

Imani Gandy: Jesus Christ. Trump made this ridiculous claim one day after Mike Pence said, "We don't have enough tests today to meet what we anticipate will be the demand going forward."

Jessica Pieklo: Oh, it gets better! Also in early March, Trump claimed that Google engineers are building a website to help Americans determine whether they even need testing for the coronavirus, and then to direct them to the nearest testing site.

Imani Gandy: This obviously was news to Google. Google was, "What?"

Jessica Pieklo: "We are?"

Imani Gandy: "I didn't know we were doing that."

Jessica Pieklo: "Since when?"

Imani Gandy: Trump also claimed that there would be widespread drive thru testing. This of course never happened. Only a handful of drive through testing sites ever popped up.

Jessica Pieklo: The hits just keep coming. Then in mid-March Trump claimed all U.S. citizens arriving from Europe would be subject to medical screening, COVID-19 testing, and quarantine if necessary. Also not true.

Imani Gandy: Keep it going, in late March, Trump claimed that he inherited broken COVID tests from Obama, which is weird-

Jessica Pieklo: Naturally.

Imani Gandy: ... since the novel coronavirus is just that, novel, and the Obama administration couldn't possibly have made any COVID-19 tests, much less broken COVID-19 tests to then bequeath to Trump. Public health experts have all agreed that because of that fact, the fact that the virus is "novel", I'm using very large air quotes here.

Jessica Pieklo: Emphatic air quotes even.

Imani Gandy: Emphatic air quotes. So the public health expert said, "That because the virus is novel, the CDC could not have possibly produced a test, and thus a new test had to be developed this year."

Jessica Pieklo: So basically testing in this country has been an utter disaster because Trump has been an absolute disaster himself when it comes to handling the pandemic. He's lied, un-lied, re-lied, about so many things in particular when it comes to tests, the when they'll be available, the level of testing this country is conducting. So, what you were saying about Arkansas? What are they trying to do with testing? What is happening here?

Imani Gandy: So like a lot of states, Arkansas is trying to use the coronavirus to backdoor ban abortion. In this particular case, Arkansas wants to require a negative COVID-19 tests for at least 48 hours before a patient can get a procedural abortion.

Jessica Pieklo: So, no testing, but we're going to make you get a test.

Imani Gandy: Yeah, pretty much. Now let's just really break down how cynical this is. So,-

Jessica Pieklo: Okay.

Imani Gandy: ... on April 27th, the Department of Health in Arkansas issues a directive that requires pregnant people seeking a procedural abortion to obtain a negative COVID test 48 hours prior to the abortion. Now, to be clear, this directive applies to all elective surgeries, it didn't single out abortion providers.

Jessica Pieklo: So this was Arkansas's way of joining the party with all the other states like Texas, who are going on saying, "Hey, you know what? There's a new pandemic, let's ban abortion."

Imani Gandy: Now almost immediately, advocates sued on behalf of three patients who needed an abortion, but hadn't been able to get a COVID-19 test and we're running up against Arkansas' 20 week abortion ban.

Jessica Pieklo: According to the lawsuit, in trying to comply with the requirement for their patients, Little Rock Family Planning Services had contacted more than 15 testing locations, 15, more than that, and they couldn't find any that would test asymptomatic people. So attorneys from the ACLU representing the clinic said that one of the three patients was recently tested twice, but they weren't able to get their results within the 48 hours of the procedure, so that means they couldn't comply.

Imani Gandy: So I need to stop you here for a minute because this is a huge point and I don't think we can stress it enough. So Jess, what do we know about COVID-19?

Jessica Pieklo: I mean, not much, right? We know that people can be asymptomatic, meaning that they can have the virus, but not show any symptoms. And we also know that due to this dearth of tests, most people won't get tested or even can't get tested until they're showing symptoms.

Imani Gandy: We also know that COVID-19 tests produce false negatives. There is preliminary research out of China that hasn't been peer-reviewed, but it suggests that the most common form of COVID-19 test produces false negatives up to 30% of the time.

Jessica Pieklo: 30%?

Imani Gandy: Yep.

Jessica Pieklo: What? That's bonkers. One in three, 30%? That's a lot.

Imani Gandy: Yep, it is. And keeping in mind what we just said about how testing is a mess and that potentially 30% of the negative tests are wrong, let's talk about what the Arkansas Department of Health did in mandating a negative test 48 hours before a procedural abortion. They basically just mandated nonsense.

Jessica Pieklo: That's it, that's the end of the show, mandated nonsense, goodbye.

Imani Gandy: See you on the tubes. [laughter]

Jessica Pieklo: I mean, like a lot of things related to abortion restrictions, this just doesn't make any sense, okay? If 30% of the tests are negative and if it's virtually impossible to obtain a test anyway, how are pregnant people supposed to get tested?

Imani Gandy: Honestly, they're not. If people can't get tested through no fault of their own, and if getting tested doesn't mean you don't have symptoms necessarily, then what the hell is Arkansas doing?

Jessica Pieklo: Throwing up roadblocks to abortion.

Imani Gandy: Yep. Yep.

Jessica Pieklo: The plaintiffs in this case had pointed out that rapid testing, which is what it's called when you get that test result within 48 hours as opposed to a week, that has a 14.8% false negative rate.

Imani Gandy: Well, that's better than 30% at least.

Jessica Pieklo: I mean, I guess? But here, let me put it to you this way, if I gave you a bowl of M&Ms and said that 14% of these are poisoned, are you eating M&Ms?

Imani Gandy: I mean, in this economy, I might.

Jessica Pieklo: No, Imani!

Imani Gandy: I'm just kidding. I wouldn't. I wouldn't. You make a very good point.

Jessica Pieklo: So the tests produce a lot of false positives. It's even worse than that though, too. Like we saw in this lawsuit, it's only often when the folks who have symptoms, start showing them, that they can get a test and that's because there just aren't enough tests to go around.

Imani Gandy: And like we saw in this lawsuit, even the 48 hour tests frequently take longer than 48 hours. So, what if you don't get your test results for 72 hours? Does the pregnant person have to start the whole process over again? And, how does the 48 hour COVID test requirement fit with the 72 hour waiting period requirement?

Jessica Pieklo: More questions, right? What if a pregnant person does have COVID? The directive prevents COVID patients from getting an abortion, why?

Imani Gandy: Essentially to stop the spread of the virus?

Jessica Pieklo: But people who have the virus, but don't know it, can spread the virus, so what's the test doing?

Imani Gandy: Hey man, you're preaching to the choir here, none of this makes any sense to me either.

Jessica Pieklo: Okay, so what's the status of this case. The court looked at the directive and laughed and said, "Get the hell out of here, grant it the TRO," right? "We're done."

Imani Gandy: Unfortunately, no. The district court was hamstrung by the Eighth Circuit.

Jessica Pieklo: Why is the Eighth Circuit doing anything here?

Imani Gandy: Why is the Eighth Circuit? It's just the general good question.

Jessica Pieklo: That's our next explainer.

Imani Gandy: Just: why is the Eighth Circuit? [laughter] So on April 3rd, Arkansas first banned elective surgeries, including procedural abortions, not necessary to save the life of the pregnant patient.

Jessica Pieklo: And there was a fight over that directive too, and that kind of informs what we're talking about now.

Imani Gandy: Exactly. And so, the Eighth Circuit dissolved that restraining order and claimed that under a Supreme Court case called Jacobson versus Massachusetts, a state faced with a public health crisis can take measures that may infringe on constitutional rights.

Jessica Pieklo: Oh yeah, Jacobson. So let's explain what Jacobson was about for our listeners.

Imani Gandy: Go for it. It's all you.

Jessica Pieklo: Thanks.

Imani Gandy: You get the fun parts.

Jessica Pieklo: Okay. So in Jacobson, the Supreme Court addressed whether the state of Massachusetts could hold some dude named Jacobson, criminally liable for violating a regulation requiring that he get vaccinated for smallpox. The Supreme Court sided with Massachusetts saying that, "Liberty secured by the constitution does not import an absolute right in each person to be, at all times, in all circumstances, wholly free from restraint."

Imani Gandy: Somebody should tell the ding dong lockdown protesters that they don't have a constitutional right to a fricking haircut.

Jessica Pieklo: I mean, right?

Imani Gandy: Honestly people.

Jessica Pieklo: Right. Jacobson would suggest that.

Imani Gandy: Yeah.

Jessica Pieklo: Under Jacobson, a directive like Arkansas' issued in response to a pandemic is not subject to a constitutional challenge, unless that directive has no real or substantial relation to the COVID-19 health crisis, or it is, we've got a test here, beyond all question, a plain palpable invasion of a pregnant person's right to elective abortion. A palpable invasion, that's a strong term.

Imani Gandy: Yeah. Clean and palpable.

Jessica Pieklo: Yeah. Yep. Yep. And since the April 27th directed was less burdensome than that first one, that April 3rd one, which the Eighth Circuit said was just fine, the plaintiffs couldn't possibly be and entitled to an injunction here the district court thought.

Imani Gandy: Exactly. And the district court is not happy about it. You can tell from reading the Opinion, the court spent pages and pages detailing the hardship that this rule poses on people seeking an abortion. But the Eighth Circuit already Eighth Circuit all over the place, so the district court couldn't do anything but side with Arkansas and uphold that directive, right? Because that directive saying, "You got to have the COVID-19 test," is less burdensome than the original directive, which banned all procedural abortions all across the board. So the district court was, "They got to follow precedent." That's a thing.

Jessica Pieklo: I just had a clean-up in aisle five after the Eighth Circuit just eight circuted over everything.

Imani Gandy: Clean up on aisle Fifth Circuit?

Jessica Pieklo: Basically, that's where we're at. But what it means is that people who want an abortion now have an extra hoop to jump through, and one that they may not even be able to jump through at all due to the Trump administration's horrible handling of this pandemic with the lack of available testing.

Imani Gandy: Yep.

Jessica Pieklo: And some people aren't going to be able to get abortions at all because of this extra hoop.

Imani Gandy: Also true.

Jessica Pieklo: And this is all just one big ruse to try and get rid of procedural abortion in Arkansas altogether, Imani.

Imani Gandy: Okay, now say more about that. That sounds interesting.

Jessica Pieklo: Yeah. So I got a thing about this. Look, we talk all the time about how these are bad faith bands, right? There's no good reason to ban abortion in the middle of a pandemic, and they are. But what's motivating them is beyond just hating abortion, which look, don't get me wrong that's plenty of motivation in and of itself, but it is a very strategic decision to reduce points of access.

Imani Gandy: Right. So, abortion clinics are just being decimated throughout the country, and so in Arkansas, there's one left.

Jessica Pieklo: Yep.

Imani Gandy: So what are they doing like they did in Missouri when they spent years and years attacking that one abortion clinic? Arkansas is attacking this one abortion clinic.

Jessica Pieklo: Exactly. And so, not only does Arkansas only have one abortion clinic, Little Rock is one of the few places in the Southeast and Midwest where a patient get a procedural abortion, can get a later abortion. The anti-choice movement knows this, and so they are deliberately squeezing access here.

Imani Gandy: Okay, so if Little Rock Family Planning Services can't perform procedural abortions, where are patients supposed to go?

Jessica Pieklo: Well, Imani, it doesn't look great. They could go to Louisiana.

Imani Gandy: Really? They're going to go to Louisiana. We're weeks away from a decision-

Jessica Pieklo: We're a sneeze away.

Imani Gandy: Exactly. We are one hacking cough away from a Supreme Court ruling that's going to maybe leave Louisiana with one clinic, and if that one doctor decides he doesn't want to be the only provider in the state, no clinic. So going to Louisiana doesn't exactly seem like a sensible solution.

Jessica Pieklo: So they could maybe go to Alabama.

Imani Gandy: Alabama. Are you fucking kidding me? They're supposed to go to Alabama? The Alabama that tried to ban abortion outright? The Alabama that has so many restrictions that itself is being decimated when it comes to clinics? Oh God, tell me that it's got to be better than that.

Jessica Pieklo: They could go from Little Rock to Granite City, Illinois, right outside Chicago, probably. Though, no matter where it's a lot farther from them than Little Rock.

Imani Gandy: And at each point along the way, we're talking about added expense, navigating already in place abortion restrictions. And if you... here's the thing, if you read

plaintiff's complaint, I'm pretty sure you're going to end up wanting to set something on fire.

Jessica Pieklo: Oh definitely.

Imani Gandy: Because we are talking about a state that never issued a shelter in place order, right? They never said to Arkansas citizens, "Hey guys, stay the fuck home." Governor Hutchinson never said to do that.

Jessica Pieklo: Most businesses in the state remained open. Gyms reopened on May 6th, tattoo parlors, barbershops and spas, they all reopened on May 6 too, restaurants opened on May 11th. You could basically do any damn thing you wanted to in Arkansas, but get an abortion as of May 11th.

Imani Gandy: Right, exactly. And so, according to Governor Hutchinson, hospitals are empty so there's no shortage of healthcare first responders, which would imply that there's no shortage of PPE. Churches and manufacturers are open, and every physician in Arkansas, except for abortion providers, are allowed to decide for themselves using their own medical professional judgment, which patients can be provided care and which patient's care can be postponed due to the pandemic.

Jessica Pieklo: Orthodontists offices are open right now.

Imani Gandy: I mean-

Jessica Pieklo: So people are putting their hands in your mouth with-

Imani Gandy: So gross.

Jessica Pieklo: ... with stuff in a pandemic.

Imani Gandy: Right. Right. So, how the chicken fried fuck can a person go see a dentist about a cracked tooth without getting a negative COVID test first, but a pregnant person can't get an abortion.

Jessica Pieklo: Mm-hmm (affirmative).

Imani Gandy: Right? They're acting as if abortion providers specifically are somehow disease vectors when damn near everyone in Arkansas is running around nilly nilly not even knowing whether or not they have the coronavirus. But I guess it's like you said, we can try to make sense of it, but the only thing that makes sense is that they are squeezing access. It's not about the pandemic.

Jessica Pieklo: Yeah. Imani, I don't like it here.

Imani Gandy: You already said that.

Jessica Pieklo: Can we go now? I'd like a beer.

Imani Gandy: Yeah. Let's just go. We're done here. See you on the tubes. No, but first we really wanted to thank our newest supporters, right?

Jessica Pieklo: Yes. Yay.

Imani Gandy: We're going to shout you out, Rachel, Erica, Jessica, Laura, Cathy, Glennis, Elizabeth, you know that you donated, so you know who you are, we're not going to spread your last name all over the God's green internet. But we want to let you know how much these donations mean to us. They mean the world to us and they help us keep this whole Boom! Lawyer team legal project alive.

Jessica Pieklo: Seriously, thank you so much. And if you want to support us and get your shout out, go to rewire.news/boomgive.

Imani Gandy: That's rewire.news/boomgive. And if you want to talk to us on Twitter about this, about Tim Kane, about Ozark, about all kinds of things, you can find me on Twitter at @angryblacklady, you can find Jess on Twitter @thirstingfortimkaine and the APA-

Jessica Pieklo: Simultaneously.

Imani Gandy: Simultaneously. Her Twitter handle is @hegemommy. You can and should follow @rewire_news, and you should join our Facebook group, Boom! Lawyered. Answer the questions, just let us know, you're not an anti-choice numpty. And I really appreciate the person who answered the question last week that said, "I don't know the answer to these questions, but I promise I'm not an anti-choice ding dong." Immediately I knew they were cool and they'd listened to the episode, so thank you. Please join us. I don't know, man. What are we going to do, Jess?

Jessica Pieklo: I'm going to see on the tubes folks.

Imani Gandy: We're going to see you on Tim Kane's tubes.

Speaker 4: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. Marc Faletti produces the show.