

Imani Gandy: Hello, fellow law nerds. Welcome to another episode of Boom Lawyered, a Rewire News Group podcast hosted by the legal journalism team that is ready for the end of January and is bracing for Black History Month. So much trolling goes on in Black History Month these days. My goodness. I'm Imani Gandy, editor at large for Rewire News Group.

Jess Pieklo: And I'm Jess Pieklo, Rewire News Group's executive editor. Rewire News Group is the one and only home for expert repro journalism that inspires you to thank an abortion provider and the Boom Lawyered podcast is part of that mission. So big thanks to our subscribers and a welcome to our new listeners and viewers.

Imani Gandy: In 2021 at Rewire News Group, we bookmarked our publishing season with two special editions, right? Our first edition that year was all about medication abortion being the future of abortion access. Our last edition that year was called The Gathering Storm, and it dealt with the criminalization of pregnancy as this storm gathering off the horizon, just waiting to unleash on us.

Jess Pieklo: Well, it's 2023, and that gathering storm is here. We are at the intersection of the criminalization of pregnancy and the future of abortion access, and that's not a coincidence. So that's what we're going to talk about today. As more and more people turn to medication abortions, more and more antis are going to try to find ways to criminalize the use of medication abortion. So let's get into it.

Imani Gandy: So first, let's talk a little bit about why is medication abortion so great? What's the big deal with medication abortion? Everyone's talking about it. It's so great future of abortion access. Why?

Jess Pieklo: Because it's safe and effective. It is safe and effective. It works. That's why they hate it. It allows people to manage their abortions at home if they want to. It's really not any more complicated than that. But let's get into some of the mechanics a little bit. All right. So medication abortion relies on two drugs, mifepristone and misoprostol, and listeners and viewers Imani always makes me say the drugs, always.

Imani Gandy: 'Cause she's good at it. I can't pronounce that.

Jess Pieklo: Those are the two magic drugs to terminate a pregnancy. So here's how it works. The pregnant person first takes a dose of mifepristone which blocks progesterin receptors and stops the pregnancy from continuing to develop. You wait 24 to 48 hours, and you take a second dose of misoprostol that causes the uterus to contract and empty itself. You're done. All right.

Imani Gandy: Bing, bang, boom.

Jess Pieklo: Bingo, bango, pregnancy's done. Basically, that's simple. Now, a Guttmacher report shows that more than half of the abortions in 2021 were medication abortions. All right? Makes

sense folks. Happen early in pregnancy. The thing is that number is going to likely increase as well, thanks to the Biden administration making abortion pills available at retail pharmacies in 2022 and eliminating the need for in-person clinic visits in 2021. Both very important developments at the federal level.

Imani Gandy: And this is why anti-choicers have been fear-mongering about medication abortion so much lately, right? They have filed a lawsuit challenging the FDA rules regarding the safety of abortion pills, challenging the FDA protocols regarding medication abortion. The FDA approved medication abortion in 2000. Since then, it has proven to be nothing but safe, and effective, nothing but safe and effective. But here comes a coalition of ding dongs, led by Alliance Defending Freedom, head ding dong in charge.

Jess Pieklo: I was literally just going to call them the head ding dong.

Imani Gandy: The HDIC, making wild claims about how unsafe medication abortion is. They're making these claims of course, in a case sitting before Matt Kacsmaryk, of course, this Trump judge, he's the new, what's the other guy?

Jess Pieklo: Reid O'Connor.

Jess Pieklo: Reid O'Connor, right? He's the young Reid O'Connor. He's the guy that conservatives are going to in the Northern District of Texas in Amarillo, Texas, filing these lawsuits, these broad lawsuits, seeking to impose injunctions on things like medication abortion, you know, the ACA, DACA back a few years ago. They want to go and file lawsuits in this court so that they can implement nationwide injunctions, right? So that if they can get an injunction banning the use of medication abortion on the grounds that it's unsafe, that means in states that are abortion friendly, like California and Vermont and Michigan, which just put in all of these great protections for abortion rights, a medication abortion will be banned in those states too.

Anyway, we're going to talk more about that case in an upcoming episode because it's really important, but I just want you to put a pin in it and just know in the back of your mind that it's there. Also, you should know that the plaintiff in that case Alliance for Hippocratic Medicine, would it shock you to learn that they just sprung out of nowhere recently? They don't have any offices, they don't even have a working website that has any information on it. It's just, again, a coalition of ding dongs backed by dark money. Their goal is to undermine the usage of medication abortion because they know so many people are going to be using it going forward.

Jess Pieklo: Huh? Weird.

Imani Gandy: I mean, look at it this way. They want to fearmonger about medication abortion, and make it seem like taking medication abortion is the same as using crystal meth.

Jess Pieklo: Absolutely. I mean.

Imani Gandy: That's what they want to.

Jess Pieklo: Across the board, I mean, look at the way they describe it, right? It's not medication abortion, it's chemical abortion. It's Clorox abortion, right?

Imani Gandy: Like Drano abortion.

Jess Pieklo: Really, it is so bad. And we know that this is absolutely the front, the next front for the anti-choice movement, because once again, they have told us. So 40 days for life, you know, the group that is out there protesting, you know, in the month of January right now, has said, hey, in response to the Biden administration, relaxing some of these FDA regulations around accessing medication abortion, and pharmacies, we are going to take our protests to the pharmacies. So coming soon to a Walgreens or a CVS near you is going to be a bunch of fetus porn. Great.

Imani Gandy: You know what? Go for it. Go and protest every brick and mortar CVS, every brick and mortar Walgreens. Just get out there, get away from the clinics and go protest big corporations. Like, who gives a shit? I don't care. So annoying.

So here's the second thing we're going to talk about, and this is going to be a doozy, 'cause Alabama, the Attorney General's office is off the chain right now. So the Alabama Attorney General, through his spokesperson, is threatening to use drug laws to take down medication abortion, essentially.

Jess Pieklo: This is such a mess. All right. So Alabama has banned abortion. There's no abortion in Alabama right now. All right? And that ban has been in effect since the Supreme Court overturned Roe v. Wade in the Dobbs opinion on June 24th, 2022.

Imani Gandy: The day that will live in infamy.

Jess Pieklo: Truly like, it's bad. More on that later. But here's the thing, Imani, so Alabama big surprise that they banned abortion right away. But they said specifically in their ban that pregnant people cannot be held criminally or civilly liable for terminating their pregnancy. And this is a really important point. I'm going to talk about this a lot because we have Steve Marshall, Alabama Attorney General, someone from his office who spokesperson for the AG's office, said in an interview that that ban, The Human Life Protection Act, which.

Imani Gandy: I swear to God.

Jess Pieklo: Always. That it does not provide pregnant people with an across the board exemption from all criminal laws, including the state's chemical endangerment laws. So in this interview, he was like, yeah, I know that the law says that we can't go after pregnant people, but I kind of disagree. I don't think that's the case.

Imani Gandy: I just kind of want to, can I please, can I, can I, huh?

Jess Pieklo: So here's what he's talking about, though. The Alabama Chemical Endangerment statute was enacted in 2006, and it's a law that basically says, don't raise your kids in a meth house, for example, right? Like, if you do, there is liability that will attach to you as a parent. This law was not meant to attach to go after pregnant people.

In fact, the very conservative Alabama legislature rejected multiple attempts to amend the law to specifically allow prosecutors to use the chemical endangerment statute to attack, to prosecute people who were pregnant for failed pregnancy outcomes. That was rejected. It's not in the statute.

Imani Gandy: But they're doing it anyway.

Jess Pieklo: The law, that they don't give a shit.

Imani Gandy: They don't care.

Jess Pieklo: They're doing it anyway. Prosecutors have been using the state's chemical endangerment law to imprison people who use drugs, and have bad pregnancy outcomes.

Imani Gandy: And what's depressing to me about that, aside from the fact that we shouldn't be putting pregnant people in jail for bad pregnancy outcomes, is the way it seems to affect these people psychologically.

For example, I'm thinking of Amanda Kimbrough. Amanda Kimbrough was sentenced to 10 years in prison because of a bad pregnancy outcome. She gave birth to a son and her son died. Her doctor said that it was as a result of something called umbilical cord prolapse or a cold cord prolapse, which essentially means that when you deliver the baby, that the umbilical cord gets delivered through the birth canal, along with the baby, and wraps around the baby's neck and can cut off blood flow. The doctor said that's what caused Amanda Kimbrough's baby's death.

But the prosecutors were like, yeah, but the meth, what about the meth? Sentenced her to 10 years in prison. And she wrote an essay a couple of years ago that I read where she made it sound like she was very contrite. Like, yeah, I made this mistake and I shouldn't have done this, and blah, blah, blah. It's like, honey, no.

First of all, there's no evidence that the quote unquote mistake that you made had anything to do with the outcome. Second of all, even if you were just like, just doing rails and rails and rails of crystal meth, that means you need help. You don't need imprisonment. You know, we shouldn't be so cruel to people who need help, but Alabama has been doing this. And so this idea that, oh, I didn't really mean to, I just. The idea that Alabama has been consistently throwing people in jail for 10 years, and then it's coming out and trying to say, well, we're going

to do this, and then saying, no, we're not going to do this. Make up your mind, man. Do you want to imprison pregnant people or not? Or are you just going to lie about it?

Jess Pieklo: Yeah. And for folks new to the podcast, absolutely Google Imani Gandy and the Kimbrough case, because as far as the journalists who were out there, she was all over this, you were reporting on this and describing and explaining for folks that this was really a canary in the coal mine a decade ago. Literally a decade ago.

And here we are with the state Attorney General's office now saying, this has been going on, and we're going to lean into it. We're going to really double down into it. So here it is, basically saying, yeah, if you use medication abortion, we are considering that as a chem, as, you know, violating the chemical endangerment statute. That means potentially that if you're self-managing an abortion through medication abortion in Alabama, that could land you in jail. All right? But hey, he walked it back.

Imani Gandy: Yeah, he walked it back. No big deal.

Jess Pieklo: He pulled an Urkel.

Imani Gandy: Yeah, he was like, did I say that? I mean, Jesus Christ, man. Like, I said, make up your mind. Do you want to put pregnant people in jail or do you not? Or do you want to do it, but you just don't want to do it out loud? Because, you know, people aren't really that yet. Popularly in the public eye, people aren't really yet on board for just tossing pregnant people in jail for bad outcomes.

Jess Pieklo: Yeah. Here's the thing. I don't believe him. I don't believe him. You shouldn't, nobody should believe him. Marshall's full of shit.

Imani Gandy: Nobody should believe him.

Jess Pieklo: Don't believe him.

Imani Gandy: Here's what probably happened. He went out, ran off at the mouth, was like, yeah, you know, our abortion ban doesn't cover pregnant people, but you know what does, our chemical endangerment statute. And someone was like, hey, buddy, keep that on the DL. Can you knock that off. Right?

Like, I mean, he basically explained according to reports from the local Alabama news station, WSFA, he explained that Alabama has this separate law involving exposure of fetus to certain chemicals, right? The separate law, the chemical endangerment law. So there would be no need to use to sort of criminalize medication abortion specifically. Because if there's some sort of chemical issue, we've got this other endangerment law. He said, if a fetus is harmed by taking other illegal drugs like narcotics, the mother can be prosecuted under the chemical endangerment law. He said, quote, for example, ingesting methamphetamine could be

something that's actionable criminally. And in fact, those prosecutions have taken place in Alabama. By no means have we said, we are using the FDA's rules as a way of targeting women under that old statute, to which I say A, horseshit. And B, the fact that Alabama is using the chemical endangerment statute to put pregnant people in jail for bad pregnancy outcomes, it means that the Alabama Attorney General, and the prosecutors in Alabama are willing to go rogue, and use laws to prosecute pregnant people that weren't intended to do so.

Because as Jess mentioned earlier, the very conservative Alabama legislature tried to amend the chemical endangerment law so they could prosecute pregnant people. And the conservative legislature said, no, we're not going to do that. Multiple times they said no. So no, whatever Steve Marshall is saying he's planning to do or not planning to do when it comes to pregnant people, expect the worst because they will do the worst because they have been doing the worst, ask Amanda Kimbrough.

Jess Pieklo: Absolutely. It's because he is the worst. And it is no surprise that Marshall would be taking this position at this time. All right, so this guy.

Imani Gandy: This fucking guy.

Jess Pieklo: This fucking guy. He was among a group of attorneys general, and I love, I get to say.

Imani Gandy: Attorneys general. It's been a while since we've used the phrase attorneys general. I love it.

Jess Pieklo: It's not attorney generals, attorneys it's general.

Imani Gandy: Like Missions Impossible.

Jess Pieklo: Ooh. I love that. He's among a group of Attorneys General, he sent a letter to the FDA commissioner complaining about the FDA policy of making abortion pills available in retail pharmacies. I mean, big surprise there. But listen, this is what he had to say with some Easter eggs in terms of, you know, things to look out for. All right? It's my best Steve Marshall impression.

The Food and Drug Administration. I'm sorry. The Food and Drug Administration's decision to abandon common sense restrictions on remotely prescribing and administering abortion inducing drugs is both illegal and dangerous. Ding, ding, ding. In direct contravention of longstanding FDA practice, and congressional mandate, the FDA's rollback of important safety regulations, oh, I'm sorry. Restrictions. Got a little too into character there. Ignores both women's health, another big flag and straightforward federal statutes. We urge you to reverse your decision. I'm sorry.

Imani Gandy: I mean, Jesus.

Jess Pieklo: So look, here's the thing. It would be a mistake to think in any way, shape, or form that Marshall has reversed course here. He has not. He just, as Imani said, wasn't supposed to say the quiet parts out loud. And he did.

Imani Gandy: Yeah, he did. I also love the idea that this fucking guy knows more about the safety of medication abortion pills than the FDA does, which approved them in 2000. And like organizations in Europe, medical organizations in Europe that had approved it years before that, right? Like this fucking guy knows more than a group of doctors both here and abroad. OK, my guy, OK.

But I have a question for you, Jess. If Marshall low key wants to prosecute people using medication abortion as being dangerous, some claim that medication abortion is dangerous, that the FDA is wrong and fucked up in the head, could states just ignore the FDA and criminalize the use of abortion pills, right? Like if abortion is murder in Alabama, then aren't abortion pills a murder weapon? And why can't Alabama criminalize the use of these, you know, I don't know, little abortion guns. Little abortion pill guns, pew pew pew. We're coming for your typical pregnancy. What are we even doing? We're so far off the rails, the rails don't even exist. But my question to you is, can Alabama just throw up middle fingers to the FDA, and be like, we don't care.

Jess Pieklo: Imani, I thought we were friends.

Imani Gandy: I mean, we are friends, but also you have a deep love for the administrative state and the APA and I feel like I'm giving you an opportunity to really just express yourself. So why don't you go ahead and take this opportunity?

Jess Pieklo: I just went like, I'm going to vogue now. So the easy answer would be in the normal times, yes. That there would be guardrails. That there should be something called the rule of law.

Imani Gandy: Oh my God.

Jess Pieklo: And norms and procedures that blocks states from going rogue. But you know, here we are on the SS nobody gives a fuck anymore uncharted waters. And there is really only a federal judge with the ability to just stand up to this nonsense, and a will, a way. I don't know. I mean, truly there are legal principles that should apply, right? The FDA has authority, is an authority to regulate in this area, it has done so. There's no reason to think that that exercise of authority was an abusive discretion, was arbitrary and capricious.

Imani Gandy: Ooh, you love saying arbitrary and capricious. See, I gave you an opportunity to say that.

Jess Pieklo: So there's no reason to think that the agency is doing anything that it can't do. Now, states can't just then go decide to redefine its own stuff in contravention to those agencies, to that federal law. And there's a constitutional principle that is related to that, right? The idea of supremacy of when the federal government steps into certain areas, the states have to step back.

We are in the upside down of the law. And I mean, all of this is already under attack. Imani mentioned one lawsuit that we'll be diving into in greater detail in the show in another episode. But there's another attack, it's a birth control lawsuit. But it's related 'cause they're making the same arguments around safety, around efficacy, around agency's ability to regulate. And what if I told you that lawsuit was also in front of Kacsmaryk.

Imani Gandy: Not good.

Jess Pieklo: Surprise.

Imani Gandy: So two lawsuits. To destroy medication abortion and to destroy the right to birth control. Both claiming that it's some sort of chemical emergency. It's really, really bad for you. In contravention to what the FDA has said for medication abortion for 20 years and for birth control, however many decades beyond that.

Jess Pieklo: Exactly. And so.

Imani Gandy: This one Trump judge gets to decide for the whole country.

Jess Pieklo: Yes. Yes. That fucking guy knows more about the safety of abortifacient and hormonal birth control than the entire scientific community combined. Sweet. I love it here. It's great. My favorite.

Imani Gandy: Even worse than Alabama. 'Cause Alabama's like is being kind of wishy-washy. Like we're not going to throw you in jail. Yeah. Yes we are, just kidding. Oklahoma just doesn't give a fuck. They don't care who knows that they want to imprison pregnant people. They introduced a bill, a new bill that would amend the state's abortion restrictions to eliminate language that protects pregnant people from prosecution. Let me say that again. They want to take a bill that already exempts people, pregnant people, from prosecution, and eliminate that protective language so that if you induce an abortion, that's a felony charge.

What induces an abortion? Medication abortion. Abortion pills. So this is specifically targeted at people who want to self-manage their own abortions in Oklahoma. What the hell? What is going on in Oklahoma? You're Oklahoma adjacent. Having grown up in Nebraska, I feel like you've got some insight.

Jess Pieklo: That's amazing because that's basically like a whole regionalism war too. Like Nebraskans would never claim Oklahoma, and Oklahoma would never claim Nebraska.

Imani Gandy: I'm an outsider, you're all the same to me.

Jess Pieklo: Oh. But what is it with Oklahoma and always being so eager to be the absolute worst out of the gates with this stuff. Because I mean, look similar to Alabama, Oklahoma's already throwing folks in jail for stuff like this. In previous episodes we've talked about the case of Brittney Poolaw, a member of the Comanche Nation who is in jail right now for manslaughter after having a miscarriage, 12 weeks, not a viable pregnancy, serving a manslaughter sentence. For a non-viable pregnancy, like.

Imani Gandy: Not only for a non-viable pregnancy, but as with Amanda Kimbrough, there was no evidence that Brittney Poolaw use of crystal meth had anything to do with the bad pregnancy outcome. But you know, you see a brown lady, you see drugs, you make assumptions, she ends up in jail.

Jess Pieklo: Yep. Here's the thing though. I hate to say it, but it's not Oklahoma because Arkansas was like, whoa, it's a party, hold my beer.

Imani Gandy: Of course, Arkansas just logged onto the chat.

Jess Pieklo: In legislation proposed already this session, Arkansas conservatives are considering letting prosecutors charge folks who get an abortion under the state's homicide laws. So it's modeled functionally after what is going on in Oklahoma right now. So, this idea is catching on and it's catching on in state legislatures and it's catching on even if national anti-choice folks are denying it, even if they're out there in the media, in places like the Washington Post and the New York Times saying, we don't really know what's next for the future of the movement. We're just going to get together and have a good think about it. No, they're not. They're not. They're coming to prosecute pregnant folks. And as Imani mentioned in the last episode, all of that is going to lead to increased separation of Black and brown families. It's not good.

Imani Gandy: It's not good. And speaking to the separation of Black and brown families, you're putting people in prison who already have kids in some respects, like Amanda Kimbrough is white, but she already had kids that she was trying to raise. When she had a bad pregnancy outcome that was unrelated to her drug use. But then she, you know, was in jail blaming herself. Her kids were at home being raised by, not sure whom, hopefully she had family members, but other people don't. Kids end up in social services, social services programs in many states are just abysmal. Like in Texas, for example, kids who age out of the foster care system there, have PTSD rates similar to combat veterans. A federal court found that. So.

Jess Pieklo: Imani's not just making that up. That's like a finding of fact.

Imani Gandy: A finding of fact. So we are damaging a generation of kids by removing their parents based on essentially bullshit. And it's alarming. So that was a fun episode. I mean no one expected the post Roe world to be cheery.

Jess Pieklo: I mean. Fair.

Imani Gandy: We're doing what we can to bring you the information, but also in a way that's not going to make you want to dive off the first floor of your stairwell.

Jess Pieklo: Please don't.

Imani Gandy: Please don't just, just a little hop off the bottom step dramatically. Like, ah. Well, if you would like to talk to us about any of this stuff, if you want to know about my specific ways of jumping down off that first step so I can get the drama, but not injure myself. You can find me on Twitter at AngryBlackLady. You can find Jess on Twitter at Hegemommy, h-e-g-e-m-o-m-m-y. You should follow Rewire News Group on all of the things, on Twitter, on Instagram, soon on TikTok, which is going to be amazing.

You should subscribe to our YouTube channel, youtube.com/rewirenewsgroup. That's where you will find notifications about every time our podcast goes live on YouTube. If you're tired of looking at our silly faces, you can just listen to the podcast through your ear holes, the way you always have, Google Play, Overcast, Apple Podcast, wherever you get your podcast. That's where we will be. We'll be there and we'll be in your hearts. And on that note, Jess, what are we going to do?

Jess Pieklo: We're going to see you on the Tubes folks.

Imani Gandy: See you on the Tubes, folks.