

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 sad that the Eagles lost the Super Bowl, but is excited that a Black quarterback won the Super Bowl. So hooray! My name is Imani Gandy, and I'm Editor-at-Large at 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, I don't know, take a page outta Rihanna's book. Honestly, any page, she's got it. And the "Boom! Lawyered" podcast is part of that mission. So a big welcome to our subscribers, and a thanks, hello, to viewers and listeners.

Imani Gandy: So as we've talked about, antis are coming for medication abortion, right?

Despite all the claims about how they just wanted to throw it back to the states, in actuality, they will not rest until medication abortion is criminalized in every state, even the blue states. And because they know that medication abortion is the future of abortion access, as we at Rewire News Group have been telling you for years now, they're fighting really, really hard to ban it. And if they're successful, what if they're successful? Chaos reigns, right? Chaos. The entire health-care system is gonna be thrown into chaos, because more people will need procedural abortions. That's gonna increase wait times, it's just gonna be an absolute disaster.

Jess Pieklo: Yeah, but here's the thing, Imani, the antis don't care about any of that. Literally none of it. They have nary a care to give about people seeking health care. No, no, no, because instead, they have a plan, and they are sticking to it. Leave abortion to the states? I'm sorry, are you kidding me? They would never leave abortion to the states, no, no, no.

So here's what they're gonna do. They're gonna go to a conservative lawless judge, who's sympathetic to the cause, and ask him for a nationwide injunction banning mifepristone. That's one of the two pills used in the medication abortion regimen. And that's what we're gonna talk about today. This lawsuit was filed before a lawless judge in Texas by a pop-up anti-choice organization in... Imani, guess where?

Imani Gandy: I don't know.

Jess Pieklo: Tennessee of all places. Tennessee is suing in Texas. What? The lawsuit is called the Alliance for Hippocratic Medicine versus FDA. And like I said, they're seeking an injunction in federal court in Amarillo, Texas, that if successful, would pull one of the pills used in medication abortions from the market.

Imani Gandy: And the lawsuit is nonsense, it's just absolute garbage. And that's what we're gonna talk about first, the absolute garbage-ness of this lawsuit, right? I mean, it's AstroTurf litigation, that's what this is. The organization that Jess mentioned is called the Alliance for Hippocratic Medicine. Their Secretary of State records say that they were formed in August 2022. August 2022. The lawsuit was filed in November 2022. And as Jess said, they're

incorporated in Tennessee. So why on God's green earth are they suing in Texas? Well, let me tell you, because they have a favorable judge there.

Jess Pieklo: And I mean, does it sound absurd? Yes. Is it surprising? No, not in the least bit. Because if one thing that conservatives and Republicans are good at, it's this AstroTurf litigation. And so what is AstroTurf litigation? That is literally where a group from Tennessee figures, "Hey, you know what? We're gonna pick a fight in Texas. And in order to do that, we're gonna create a group."

This is like, literally make believe. They are coming in, dropping out of the sky outta nowhere, picking a fight they have no business to pick. Political organizations propped up by, I don't even have any idea. God knows the dark money behind here. And like I said, they cook up fights. Find a judge sympathetic to their cause, and then try and blast it up through the federal courts, to the Supreme Court. Where, surprise, surprise, there are a bunch of handpicked Federalist Society stooges just waiting, waiting with open arms to hear this grievance, this complaint, this nonsense litigation. Usually it's groups like ADF, the Alliance Defending Freedom, that brings this case, these kinds of cases, right? As is the case with this one. Now, Imani, I have something for you.

Imani Gandy: Oh, boy.

Jess Pieklo: We're talking about abortion, we're talking about a cooked-up nonsense fight. Guess who's behind this? Guess who is the lead attorney in the case? You know what, no, you're never actually gonna guess this. It's so bad, I like, I can't, I'm sorry. I don't wanna step on my own line, but truly... It's a woman. Her name might sound familiar.

Imani Gandy: OK.

Jess Pieklo: Erin Morrow Hawley. Let that just sit.

Imani Gandy: As in Senator Josh Hawley of Missouri?

Jess Pieklo: Senator Josh Hawley's wife is really involved.

Imani Gandy: As in, noted insurrectionist Josh Hawley? As in the guy who walked by the protesters and was like, "Yeah, power to the people," and raised his fist, that Josh Hawley?

Jess Pieklo: That Josh Hawley, that's the one. Here, making an appearance, the Hawleys. Anyway, I just wanted to just, you know, note that for reasons, really, reasons, it's just coincidence, coinkydink here. We should probably talk about their arguments though.

Imani Gandy: All right, let's do it. So the Alliance for Hippocratic Medicine, they're the primary plaintiff in this case. There are a couple of other individual ones, but we're gonna focus on the

Alliance for Hippocratic Medicine. They're arguing that the FDA shouldn't have approved Mifeprex when it did in the year 2000. 2000.

Jess Pieklo: Hold up, the millennia?

Imani Gandy: The Will-ennia, if you recall, if you wanna get "Jiggy With It."

Jess Pieklo: Oh, I recall. ♪ Gettin' jiggy with it ♪

Imani Gandy: OK, alright, we're already off the rails. But yeah, they're saying that the FDA should not have approved Mifeprex in 2000. And they're doing so by essentially disputing the science and the evidence that led the FDA to approve Mifeprex. And they're doing it with these cherry-picked studies that don't even support their claims. So what they're doing essentially is they're pitting the theory of "nuh-uh," against 23 years of evidence, science, studies, documents, justifying the FDA's approval of Mifeprex, in again, the year 2000.

Jess Pieklo: I just have to adjust myself in my seat here for a minute, because I'm picturing their legal argument's nearly old enough to buy a beer.

Imani Gandy: Seriously, seriously!

Jess Pieklo: How? We talk about things being timely in the law, like I'm really, truly struggling for words right now. Let me just suggest that complaining about an FDA approval from 20 years ago might be wildly untimely? Like just a little bit late, just a smidge, just a skotch. OK like the FDA, as Imani said, first approved the drug in 2000. And, you know, when the law mattered, we had things like the statute of limitations for bringing certain types of claims. That was like a time bar, so that we weren't here 20 years later complaining about FDA approval. They had six years, I don't know, their main claims should have been raised before they could drive, right? Like before it was old enough to drive, I just... 'Dobbs' changed a lot. And the fact that we can even do a podcast entertaining a complaint by a pop-up, anti-choice organization that should have been filed over a decade ago, is Exhibit A, right?

Imani Gandy: Yes, and also, would it surprise you if I told you that the requirements for a preliminary injunction, which is what they're seeking, they want this judge to enjoying, enjoying. They want this judge to enjoin, right? Marketing this product, providing this product. They have none of the qualifications that need to be met for a preliminary injunction, right? A preliminary injunction is supposed to maintain the status quo while parties litigate their claims. Like a lot of times we talk about preliminary injunctions as if they are, like, the end-all, be-all of litigation, but they're not.

They're just that first step that says, "Hey, we've got beef, we need to maintain the status quo while we litigate our claims," right? So here, the status quo would be letting medication abortion remain on the market, letting Mifeprex remain on the market, while the litigation proceeds, right? That's number one. Number two, for a preliminary injunction to be issued, the parties seeking

that injunction must have suffered, or must be suffering irreparable harm, if that injunction is not granted, right? So the AHM, the Alliance for Hippocratic Medicine, must prove that they will suffer harm, irreparable harm, in order to ask and get this preliminary injunction. There's no irreparable harm here. All this would do, permitting this preliminary injunction to go forward would do, would upend the status quo, and all of the reliance interests, when it comes to medication abortion, when it comes to Mifeprex, right? Because patients and doctors have been relying on mifepristone, as well as businesses involved with the distribution of mifepristone, right? We're talking about Big Pharma, the people that are making these pills.

Jess Pieklo: My shocked face is that, you know, the antis are out here filing these like, wildly untimely claims that can't even meet the basis of what they are seeking, in terms of preliminary injunction. Because, you know, look, I'm no fan of civil procedure, as we have established on this podcast, time and time again. But would it also surprise you to hear that they don't seem to really have any legal standing in this case, right? They don't have a dog in the fight, that's what standing is. As Imani said, you have to be able to show that you, as a plaintiff, as a party to a lawsuit, are being injured in some way. I have a question for you, Imani.

Imani Gandy: Hit me.

Jess Pieklo: Where's their fucking injury? Where? How? Plaintiffs need an injury. They need to have lost money. They need to have lost something. They need to be harmed by the fact that mifepristone has been available on the marketplace for over 20 years. And look, like I said, I'm no civil procedure fan, but as best I can tell, they don't have an injury here. There's not one. They're what, a group of physicians in an organization comprised of members who have, what? What are they saying that they've lost here? Help me.

Imani Gandy: Well, Jess, I feel like you're being a little bit unfair to this group of physicians, because they have grave injuries. And let me tell you what they are. They are claiming that they will be injured, because other physicians will prescribe mifepristone to patients, who will then have adverse events. And then those patients will seek care from one of these complaining physicians, right? From one of these members of Alliance for Hippocratic Medicine. And then that complaining physician will be forced to divert time and resources from other patients, from non-medication abortion patients, which will then subject them to potential liability, and exposure, and increase insurance costs. And potentially cause them to suffer grief, distress, and guilt.

Because you see, these medication abortion patients are gonna come in with adverse events, and then all the other patients are just gonna be thrown to the wayside, while these physicians have to work on these patients. And it's gonna cause them so much stress, and it's gonna cause them so many sads. And it's gonna give them the medication abortion blues, and they're gonna be all like, ♪ Da na, na na, this patient walked into my office ♪ ♪ Da na, na na, she had an adverse event ♪ ♪ Da na, na na, it was because of mifepristone ♪ ♪ Da na, na na, now I gotta repent, I said ♪ ♪ Oh, baby ♪ ♪ Medication abortion is giving me the blues ♪

Jess Pieklo: Oh my God, "and now I gotta repent." "And now I gotta repent."

Imani Gandy: I came up with that on the fly, I was like, "Oh my God, I need to come up with a word that rhymes with that."

Jess Pieklo: 'm sorry, I was busy trying to make a flow chart of the potential injury that you were describing. That was like my Carrie Mathison string board in the background, in terms of how they were-

Imani Gandy: You're Charlie Day, like...

Jess Pieklo: Seriously, like, "And then it's like this, and this is how we're injured!" And then we had to take a—and then we had to take a blues break. But look, here's the thing folks, you thought that was bad? It gets even more ridiculous, it really truly does. OK so hold on to your butts for this one. They're arguing that the FDA's actions... Imani, I just wanna prepare you for this one too.

Imani Gandy: I don't like it, I already hate it.

Jess Pieklo: You already don't like it, you already hate it. They're arguing that the FDA's actions, by approving mifepristone and allowing it to stay on the market, deprive them of the opportunity to provide pregnancy care.

Imani Gandy: I'm sorry, what now?

Jess Pieklo: Deprive them of the opportunity to provide pregnancy care.

Imani Gandy: The opportunity.

Jess Pieklo: Hold on, hold on, as if the FDA hadn't approved medication abortion, then these physicians would be able to provide pregnancy care to these people taking mifepristone instead.

Imani Gandy: So what, they're arguing something like, tortious interference with business opportunities? Like if people weren't taking medication abortion pills, then they would necessarily be going to these particular physicians and seeking pregnancy care, right? Like that is speculation of the highest order, It doesn't even make any sense. There's no way that they have of knowing that a particular medication abortion patient would otherwise go to them for pregnancy care. Like, in the world are they talking about? That's absurd.

Jess Pieklo: Absurd. Like, and I mean, Imani, we've been doing this for a while, right? This is truly one, this is a new level of absurdity. Just when you think they've reached the heights, nope, they're up there high-fiving Jesus. It is wild.

It is wild. Courts have consistently, let me say that again, consistently rejected this kind of speculation based on like, "Well if, first of all, I hadn't, I don't know, like decided to put the package containing explosives down by the train tracks, then five miles later we wouldn't have an explosion that caused injury to Mrs. Pollsgraph." That is a deep-cut for the tort student. The idea is that the law requires plaintiffs to show some closeness to the event that they're claiming injured them, and the injury that they received. Not 40, 50 steps down the causal chain, it's gotta be close, right? They can't prove that but-for medication abortion, a particular individual would have gone to a particular physician for pregnancy care. And that's my point of that ridiculous tirade.

Imani Gandy: It's even more ridiculous when you think about the statute of limitations, right? The six-years statute of limitations that you talked about. So if even if all of this stuff weren't wildly speculative, like even if we could say, "Yeah, sure, you know, it's depriving people of providing pregnancy care." Abortion pills have been in circulation for 20 years. If any of this parade of horrors that the Alliance for Hippocratic Medicine has set forth, if any of this shit were going to pass, it would've happened already, right? Like-

Jess Pieklo: Right!

Imani Gandy: They filed this complaint saying all of this speculation, they didn't file a declaration. They didn't file a fricking affidavit saying, "Oh yeah, you know, Jane Doe got a medication abortion. But right before she did, she came to my office and said, 'You know what, Dr. So-and-so, I wanna seek pregnancy care from you.' But then she didn't because the evil abortionist got their hands on her and shoved her full of pills."

I mean it's just, it doesn't make any sense, right? They make these sweeping and speculative assertions that the adverse events from the use of mifepristone, which by the way, are far and few between. I mean, it is a wildly safe procedure to take these pills, right? But they're claiming that the use of mifepristone, the adverse events from the use of mifepristone, will quote, "Overwhelm," sarcastic quotes, "the medical system," and their medical practices in particular, not just the whole system, but they personally are gonna be overwhelmed. And if that were true, it would have happened already, at some point in the last 20 years. And that it hasn't happened, that these people didn't supply any evidence really, that this was a problem for them. I mean, it indicates that there's no harm whatsoever, much less the irreparable harm that you need for a preliminary injunction.

Jess Pieklo: And like everything with the antis, you know, up is down and down is up. What happens if we yank this drug from the marketplace? Actual real harm, actual real chaos, actual real injury. So the big takeaway here is that the antis' claims in the lawsuit are legally nonsense. But, and this is a big important "but" here, the court is likely to buy them anyway, because conservatives now use the federal courts to impose and craft their own policy. This case is cooked up to go to the Supreme Court. And that's the second thing we're gonna talk about, right, Imani?

Imani Gandy: Right, exactly. Antis want this case to go to the Supreme Court. They really do, because they know, as you said, that they've got six Federalist Society-picked stooges waiting and ready to say, "Yeah, we're gonna go ahead and ban medication abortion. Sure, we said leave it to the states in 'Dobbs,' but we didn't really mean it."

Jess Pieklo: Right, right, if there is one thing that I could have folks take away from this episode is that this lawsuit is a political hit job on medication abortion, nothing more, nothing less. That is all. We just explained how baseless the claims the antis are making in it. Like they're just, it's ridiculous. And the thing is, for conservatives, the law doesn't matter, right? The law just doesn't matter anymore, if it ever did. The federal courts are a place where they make policy now, they implement their anti-democratic policies through these kinds of lawsuits.

Imani Gandy: That's exactly right, they use the system that they gamed, right?

Jess Pieklo: Right.

Imani Gandy: To block abortion access in states that they can't or don't control. Like that's, let me say that again—they gamed the system to get the 'Dobbs' case in front of the Supreme Court, leading all the way back to Texas' nonsense with SB 8, right, the bounty hunter law. They gamed the system to block abortion access, claiming it was gonna be just, send it back to the states. But really what they wanna do is block access in the states that they can't control, in the states like California and Vermont and Michigan, right? These states that have Colorado, these states that have shored up their reproductive rights protections, they want to knock them down.

Jess Pieklo: Absolutely. And it's even scarier because they really truly think that they can get the Supreme Court to play along here, right? So there's a playbook, it's actually very wide out in the open. First they find a friendly district court judge, they feel confident will rule in their favor. And we'll get to that in a second. Then in this case, they wait for the Biden administration to appeal that favorable ruling, where it lands before the very conservative Fifth Circuit Court of Appeals. Which we have talked ad infinitum about on this podcast, right? They helped give us Texas' bounty hunter law, and from the Fifth Circuit, it goes up to the Supreme Court, right?

And like Imani and I have suggested, thanks to the fight over Texas' SB 8, we also already have precedent of this court functionally overturning 'Roe v. Wade' on the shadow docket. Like, 'Dobbs' did it for real. But they did it on the shadow docket first, when they let SB 8, that bounty hunter law take effect. If the conservative justices really wanted to cause even more harm, even more chaos nationwide for abortion access, one of the surest ways they could do so, in the short term, is to approve whatever nonsense is gonna come outta Texas around mifepristone on the shadow docket.

Sorry.

Imani Gandy: Ugh, I can't. But you know, that's what we have here, right? The Alliance for Hippocratic Medicine, they're basically throwing legal claims at the wall, like so much spaghetti,

just throwing it right at the wall. They have no case, but the organization knew that it had a judge who would be more than happy to listen to their daft arguments. And would be more than happy to ban medication abortion nationwide. And that judge, well, his name is Matt Kacsmark, and he is a district judge in Amarillo, Texas, in the Northern District of Texas. And that's what we're gonna talk about third, we're gonna talk about the ways in which antis shopped around until they found the perfect Trump Judge in Matt Kacsmark. So who is Matt Kacsmark? Tell me!

Jess Pieklo: I really thought you were gonna say, "And that's what we're gonna talk about, this fucking guy."

Imani Gandy: This fucking guy, Matt Kacsmark, this fucking guy.

Jess Pieklo: This fucking guy was deputy general counsel for First Liberty. Sounds legit. Right? Like who's First Liberty? That's, or the First Liberty Institute, sorry, I couldn't even finish the whole thing, sounds even worse.

Imani Gandy: Sounds even worse, 'cause it's an institute, you know, you swap institute on there, it just adds a degree of gravitas.

Jess Pieklo: Oh, the First Liberty Institute is a right-wing organization that, you know, TLDR, promotes Christian theocracy. I don't know how else to like, describe it. They are anti-everything that we hold near and dear. They are anti-LGB, anti-trans, you know, they're not a big fan of abortion, broadly speaking. Democracy, questionable, if whether or not that's a good thing with these folks.

Imani Gandy: And you know, it's not just that he's that terrible, he's also doing really weird stuff in connection with this litigation. So, I'm gonna have to talk about a little bit about civ pro just a tiny bit, just like a tiny bit.

Jess Pieklo: Stop it. I thought we're friends. We already did, that's why we did the civ pro in the up-front, Imani, what are you doing to me?

Imani Gandy: I know, but we gotta, we gotta. So we all know what amicus briefs are, right? Amicus briefs are friends of the court brief, usually we see them in appellate courts. Particularly in the Supreme Court, right? The Supreme Court takes on a big heavy issue, and you get 50 briefs supporting it, and 50 briefs against it. And you know, that's just the way it goes.

There are no rules preventing district court judges, trial judges, because that's essentially what a district court judge is, a trial judge. There are no rules saying that district court judges can't permit amicus briefs, like at the initial stages of the litigation, like in support of the complaint. But that's what we have here. Matt Kacsmark is allowing amici to file briefs in support of the complaint, and the preliminary injunction request.

Jess Pieklo: I'm sorry, what?

Imani Gandy: What, what? That is bizarre, like, yeah, we also agreed that you should let this case continue, because that's essentially what the complaint is. Like the first step of a complaint, usually, is you're seeking a preliminary injunction, or the other side is trying to dismiss it. So allowing an amicus brief, in support of a complaint, is just like being like, yeah, we agree. Normally amici, they bring arguments that perhaps aren't really at the table in front of the court, or they shore up arguments that perhaps the party doesn't have time to get into, because they're limited by the number of pages that they can file with the court. That's not usually a thing. It's not usually a thing that happens at the beginning stages, but it gets even weirder.

Jess Pieklo: No.

Imani Gandy: It gets even weirder, so as we said, the Alliance for Hippocratic Medicine is incorporated in Tennessee. Matt Kacsmayk allowed a anti-choice organization from Tennessee called something like, you know, Tennessee Lovers of, you know, Jesus, and Haters of Abortion, and We Love the Unborn. It was something about like the sanctuary of the unborn, or something or other. Allowed this organization to file an amicus brief in support of the complaint and the preliminary injunction. Let me ask you a question, Jess. How long do you think this amicus brief was? How many pages do you think it was?

Jess Pieklo: Well, I mean, you know, an amicus brief is supposed to be pretty weighty, because you're, you know, contributing something substantial for the court's consideration. And any amicus brief that I ever worked on back, way back in the day, would've clocked in at, you know, 20, 30 pages before you're getting to like, an index and a table of contents, or anything like that. Like, you know, 20 pages of meat on the bone, that's what I'm going with.

Imani Gandy: Seven pages. Seven, seven, pages! Yeah, seven pages, and do you wanna-

Jess Pieklo: That's a long email, that is not an amicus brief.

Imani Gandy: I know that you filed a brief, could have been an email, could have been a text message, right? Like, let's stop with this. Here's what-

Jess Pieklo: Maybe it's really succinct. Maybe they just have the, like, legal writing down.

Imani Gandy: There weren't any legal arguments in it. There were no legal arguments in this amicus brief. The amicus brief is essentially an anecdote about a medication abortion that went awry 20 years ago in West Virginia. Really, there was a person who had an adverse event because of some horrific non-normal circumstances surrounding medication abortion. Because again, medication abortion is wildly safe, but a person died, and their estate sued. And this random, "We love the unborn, and we're in Tennessee organization," filed a seven-page anecdote explaining what happened to this woman 20 years ago. Now usually if you're, like, there's hearsay rules, right? You can't just file briefs saying like, "This happened, we swear it

did." Well, you can swear it did, but these people did swear it did. They didn't provide an affidavit, they didn't get an affidavit from the estate of this woman who died, explaining what happened. It was just like sitting around a campfire, telling tales about who died from a medication abortion in 2000. It's absolutely absurd that Kacsmaryk has allowed this, it's ridiculous.

Jess Pieklo: It's the functional equivalent of back when I was getting my perm touched up, Karen at the beauty shop was telling me a story about her cousin. Like, what is happening? What?

Imani Gandy: And even more so, I found out recently that he allowed a coalition of states to also file an amicus brief in support of the complaint and preliminary injunction. And of course, you know what these states are, they're all the red states, all the anti-choice states. All the states that were like, "You know, we're not trying to," you know, attorney generals in there talking about, you know, "We're not trying to ban abortion in the nation, we just wanna control what goes on within our own borders." But now they're filing amicus briefs saying, "We also wanna control what goes on in blue state borders."

Jess Pieklo: Right, and that's not like trying to file a brief to join the litigation, which some of the, you know, pharma companies are saying like, "Hey, hey, hey, we actually have an interest," that Imani and I are gonna talk about in a second here. This is just like, "Hey, this lawsuit, big thumbs up, big thumbs up."

Imani Gandy: "We like it."

Jess Pieklo: "We like it, we're fans." OK so this guy, Kacsmaryk, is likely to-

Imani Gandy: This fucking guy?

Jess Pieklo: This fucking guy is likely to grant a nationwide injunction. So one federal court, in one district in Texas, is poised to issue a ruling that would impact every federal district in every state in the country. Like, that's just wild reach. Anyway, he's likely to do this, even though, as we've established, the plaintiff's claims have, like, no merit. Come about, oh, you know, 16 years too late. But really, this is the rub. It's because the antis know that if they can't find a way, any way, some way, just some possibility of getting medication abortion off the market, of banning it, of really just pinching it in any way, shape, or form, that their plan of banning abortion nationwide is kaput. Like this is critical for them.

Imani Gandy: And this isn't just forum shopping, right? Like I gotta get back into the civ pro a little bit again. And I know you hate it, but you're gonna have to bear with me.

Jess Pieklo: She's mad at me for something, we're gonna talk about this offline after the episode.

Imani Gandy: But this isn't just forum shopping, right? Forum shopping happens when parties are looking for a particularly friendly jurisdiction, where the law is good, right? So imagine if it's like the aughts, around 2006, 2007, and you're trying to find-

Jess Pieklo: Those are some good years.

Imani Gandy: Those were the good years, right? Trying to find a good ruling in a same-sex marriage case, right? Where do you go? You go to the Ninth Circuit, you go to a state in the Ninth Circuit, you file in California. That's why so many of those lawsuits were filed in California, because the Ninth Circuit was the most liberal circuit in the country before Trump got his paws on it. But this is different, this isn't just trying to find a friendly jurisdiction, this is specifically trying to find a friendly judge, right?

Jess Pieklo: Right.

Imani Gandy: And that's different. And that's because of the way that sort of, the way that Tennessee, the federal courts in Tennessee assign out cases, right? Because look, they filed this lawsuit in Texas, not because they wanted any district judge in Texas, because they specifically wanted Matt Kacsmaryk. And they knew that they would get him, due to the way that cases are assigned in the Northern District. Usually district judges are chosen at random. So you file in the Northern in, you know, the Northern District of, Southern District of New York, right?

And you just get a judge, you don't get to decide what judge you get, you just get one. But in the Northern District of Texas, judges are assigned based on their divisions. And since Kacsmaryk is the district judge for the Amarillo division, if you bring a case in Amarillo, Texas in that division, you are always going to get Matt Kacsmaryk as your judge. Always, always. And while we're on this civ pro tip, I wanna talk about it a little bit more. Do you think Matt Kacsmaryk is going to entertain the party's request to change venue, to a place that's more convenient, a more convenient forum?

Jess Pieklo: No.

Imani Gandy: Of course not. Because then he won't be able to be the guy who bans medication abortion nationwide.

Jess Pieklo: I mean, and this is why he's probably one of, if not the most consequential judge, on the bench right now. And I just wanna build on Imani's point about the Ninth Circuit. Because what Kacsmaryk, as a district judge will do, in this case, in any case, what district judges do is issue findings of fact and rulings of law. And those are the legal foundations that bake into the possibility of changing law, right?

Like the Ninth Circuit was where, already before same-sex marriage lawsuits started, like appearing across the board, where some broader principles were getting worked out, which was

why that was, in part, of a good forum. Kacsmaryk is literally picked to start making law in this lawsuit, that's what he is designed to do. And if he rules the way we think he will, it's gonna be really bad. I mean, basically there's nothing to stop him from promoting his Christian theocratic agenda that we have been talking about on this podcast all season, that pops up any time he is involved in a case. And so I just really wanna drive this home, he is there to make law.

Imani Gandy: Right, and I also think that beyond being one of the most consequential judges on the bench, I think it makes him one of the most consequential public officials in the country. Right?

Jess Pieklo: Oh, that gives me a stomachache.

Imani Gandy: Right, because if this is a guy who is willing to make law, as you said, and to ignore existing precedent in order to do so, that makes him very dangerous. That makes him the guy that everyone is gonna go to when it comes to the rights that we hold near and dear, right? I mean that's just, it's a frightening prospect, that I would argue that he is probably more important, as a public official, than the liberals on the Supreme Court.

Jess Pieklo: Yeah.

Imani Gandy: And that's scary for this particular time.

Jess Pieklo: Ugh. God, all right. We gotta talk about what happens if the antis win. If this injunction gets granted, it's the fourth thing we're talking about on this episode. It's gonna cause chaos, OK? As Imani has hinted already, if the plaintiffs are successful here, it will strain our entire health-care system. Because A, abortion is health care.

Imani Gandy: Motherfuckers.

Jess Pieklo: And B, abortion is health care, motherfucker, it's actually not any more complicated than that, alright? More people will be forced into procedural abortions, will be forced into carrying pregnancies to term, will be forced into self-managing with pills, in situations they maybe didn't want to. It is going to create even more chaos, as we've been talking about since the 'Dobbs' decision and before, are in a human rights crisis when it comes to abortion rights and access in this country. This will, like, we can't overstate the harm to the system that is possible.

Imani Gandy: And it also interferes with the businesses that make these drugs, right? And those lawsuits are already being filed. And quite frankly, like, I am feeling a little bit uncomfortable with having to rely on lawsuits filed by Big Pharma, expressing their sort of business interests. But that might be our safest bet right now. Because if there's one thing that the Supreme Court, and that conservatives writ large love, it's business, right?

They might be willing to say, "Oh yeah, it's gonna screw over these businesses. Who cares about the women and the pregos, but we don't want these pharma companies to be asked out."

Jess Pieklo: Right.

Imani Gandy: And so on January 25th, just last month, a generic mifepristone-maker called GenBioPro, GenBioPro Inc., which I think is a really funny name.

Jess Pieklo: These names, I'm sorry, look, if I'm stuck rooting for Big Pharma, I'm gonna lampoon your name, like that's just part of the deal.

Imani Gandy: GenBioPro, right? It reminds me of, I don't know if you've watched "Better Off Ted," if you never have, you should watch it. Veridian Dynamics, right? Just like these ridiculous fake commercials, "GenBioPro. People, drugs, abortion." So GenBioPro filed a lawsuit, alleging that West Virginia's ban on mifepristone, because West Virginia already banned mifepristone, arguing that it violates the commerce and the supremacy clauses.

Jess Pieklo: Oh, now we're talking.

Imani Gandy: Now, the supremacy clause argument, it's easy, right? The preemption argument is simple. Federal law, trumps state law, them's the breaks, that's how it goes.

Jess Pieklo: Them's the breaks is right.

Imani Gandy: Like, at least that's how it should go. But the commerce clause, we've talked about the commerce clause, we actually did like, a whole episode on the commerce clause last, I guess it was last November or something like that. We were talking about the abortion gets, remember "[Abortion Gets Porked](#)"? That was the name of the episode, we were talking about the pork regulations in California, how California didn't want, like, New Jersey's jacked up pork, you know, essentially-

Jess Pieklo: What's pork got to do with abortion?

Imani Gandy: That's right, we sang the Tina Turner send up. ♪ What's pork got to do ♪ ♪ With abortion ♪ Exactly, so I'm gonna, if you wanna go dig deep into the commerce clause, we're gonna go ahead and we're gonna link that episode in the show notes, so you can go back and listen to it. We're not gonna go over it here, because it's a lot. The commerce clause is a lot. But just briefly, the commerce clause permits Congress to regulate interstate commerce.

Medication abortion pills is a product that is passed through, over state borders, over the hill and far away. Anyway, that's how medication abortion is part of commerce. The commerce clause also permits Congress to make sure that states aren't regulating the marketplace in a way that puts an undue burden on interstate commerce. And that's what West Virginia and some of these other states trying to ban mifepristone are doing. They are burdening the marketplace for

mifepristone, right, I mean, arguably, right? And arguably the ban on mifepristone should be invalid on those grounds.

Jess Pieklo: And if it's invalid in those grounds, on that case, it should be invalid generally. Which is exactly why the pharma companies have filed a brief in this Texas case, to argue just that. That this is a straight-up federalism issue. And also, hey, guess what? Unlike this super wildly speculative injury that the Alliance for Hippocratic Medicine has claimed, we have real business interests at stake. We have real economic reliance interests here, both past, present, and future. Not just these make-believe ones by make-believe doctors groups. So here we are, Imani, rooting for Big Pharma, I guess? Like, Big Pharma might be what keeps medication abortion pills broadly on the market?

Imani Gandy: That makes me feel wildly uncomfortable. That makes me feel uncomfortable.

Jess Pieklo: Like, woo.

Imani Gandy: Woohoo. You know, we're gonna start talking about reproductive rights in the boardroom? Like that's what we've come to, not human rights, not people who are pregnant or capable of being pregnant, they don't matter. What matters is how much money Big Pharma can make off the sale of medication abortion pills. That sucks, I hate it.

Jess Pieklo: I hate it too, but hey, I need, we need the pills. We need the pills.

Imani Gandy: You gotta have them pills.

Jess Pieklo: So, thanks, Pharma? Thanks for that.

Imani Gandy: I like how I do this, like you put pills in your veins.

Jess Pieklo: None of that is, none of that is...

Imani Gandy: None of that makes sense.

Jess Pieklo: We got some big deadlines coming up on this case. Like this isn't just a like, "Oh, we're here to talk about this for funsies," this is like, an imminent threat. So the briefs are due before the court on February 24th. And Kacsmaryk could issue a ruling from that time forward. So as of February 24th, we are on countdown watch for whether or not we're gonna get some haywire ruling out of Texas that could potentially pull mifepristone from the marketplace. Yeah, that's great.

Imani Gandy: That's terrible.

Jess Pieklo: Can I get a drink?

Imani Gandy: It's terrible, yeah, let's go get drinks.

Jess Pieklo: It's a lot.

Imani Gandy: It's so much. If you wanna talk to us about any of this stuff, if you've got concerns about medication abortion pills, or this lawsuit in general, or if you wanna talk about like, the Eagles, or why it's so goddamn hard to get Beyoncé tickets, you can find me on Twitter @AngryBlackLady. You can find Jess on Twitter @Hegemommy. H-E-G-E-M-O-M-M-Y. You should follow Rewire News Group on Twitter, on Instagram, and you should subscribe to our YouTube channel, because that's how you're gonna know immediately when our podcasts go up. And if for some reason you just don't wanna look at us, you got other stuff to do, you like to listen to your pods on the go, then you can always get the podcast in the same place you always have: Google Play.

Jess Pieklo: Yeah.

Imani Gandy: Spotify, Apple podcasts, Neiman Marcus, I don't know.

Jess Pieklo: They sell podcasts?

Imani Gandy: They're very, like, high-end luxury podcasts, made from the finest silk. Anyway, that's gonna, "Posh Pods," our producer just put in the chat, "Posh Pods," which is hilarious.

Jess Pieklo: Also, congratulations for hanging with us for 40-plus minutes on medication abortion lawsuits. Folks, you are the true champions today, that's amazing.

Imani Gandy: These are die-hard law nerds, right? They love it, they live for this stuff. And on that note, what are we gonna do, Jess?

Jess Pieklo: We're gonna see you on the Tubes, folks.

Imani Gandy: We're gonna see you on the Tubes, folks.