

Imani Gandy: Hello fellow law nerds. Welcome, welcome to special what a fuck is going on episode of Boom! Lawyered, a Rewire News Group podcast hosted by the legal journalism team that would really like to know what the fuck is going on. I'm Rewire News Group's editor-at-large, Imani Gandy.

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 grab a drink, folks. Shit just got wild when it comes to medication abortion, and the Boom! Lawyered Podcast is part of that mission, so a big thanks to our subscribers and a welcome to our new listeners and viewers. What a time to join us.

Imani Gandy: Oh my God. Okay, so the decision we've all been waiting for, for lo these many weeks, finally dropped today, right? The case is Alliance for Hippocratic Medicine v. the FDA. [We did a big, ginormous episode on this case](#) so we're not gonna go into all of the arguments right now, but the TLDR, the highlights is are this: plaintiff is Alliance for Hippocratic Medicine. They're a Tennessee-based organization. Why are they suing in Texas? Because the Northern District of Texas, the Amarillo Division, is home to one Matt Kacsmark, who is a Trump judge, conservative numpty, hates abortion, hates trans rights. Just a, just a, just a hater, basically.

Jess Pieklo: He's just a hater.

Imani Gandy: He's a just a goddamn hater. And due to the way cases are doled out in the northern district of Texas, if you file a lawsuit in Amarillo, you are guaranteed to get this fuckin' guy as your judge. This fucking guy as your judge, and that's what these plaintiffs wanted. They wanted a judge who would have the cojones to say to the FDA, "We should unapprove the authorization that you gave to this drug 23 years ago." Because apparently it's really unsafe and it's killing all the babies and all the doctors are really sad, blah, blah, blah.

I mean, essentially the Alliance for Hippocratic Medicine argued that the FDA exceeded its authority 23 years ago when it approved mifepristone. And also argued that they used a process under Subpart H, which is just a bunch of regulatory nonsense. But under that process, you can accelerate any sorts of drugs or implements that are traditionally reserved for serious or life-threatening illnesses. So of course we have a whole conversation about whether or not pregnancy is an illness, which, you know, we can talk about later. So number one, plaintiffs had no case, and before I literally stroke out, I'm gonna pass it to Jess.

Jess Pieklo: Plaintiffs had no case, yet they have a friend in Matt Kacsmark. So here's what they argued, basically: As Imani said, that the FDA had overstepped its authority over 20 years ago in approving mifepristone, that it further overstepped its authority under the Biden Administration when it opened up some avenues for making access to medication abortion more accessible, and also, in case you had any questions, an 1800s morality law called the Comstock Act, which makes it illegal to mail "obscene materials," that has apparently been resurrected in the anti-choice movement to ban medication abortion and, soon enough contraception, hormonal contraception, nationwide. What Kacsmark said in his ruling is that the

Comstock Act is entirely appropriate. It's a really super fucking cool vehicle for anti-choicers to use to do this. I am so mad. Anyway.

Imani Gandy: I know I'm very sweaty.

Jess Pieklo: So beyond that, okay, so there's that part. Further, Judge Kacsmaryk also said that one of the reasons the FDA overstepped its authority was because there is no therapeutic benefit to quote unquote "chemical abortion." And this is a five alarm fire in terms of anti-choice attacks on science, attacks on FDA authority in general, and a stepping stone, kind of a breadcrumb, for the Fifth Circuit and probably later the Supreme Court to weigh in on medication abortion generally. Here's what I want folks to know out of the gates, though.

Imani Gandy: Can I just say one thing about the therapeutic benefit so people will understand just how absurdly ridiculous this argument is?

Jess Pieklo: Oh yeah.

Imani Gandy: This judge said that quote unquote "chemical abortion," abortion pills, hold no meaningful therapeutic benefit over "surgical abortion," which we call procedural abortion. We don't use the term surgical. No meaningful benefit to using medication over going into a clinic and having surgery.

Jess Pieklo: Yeah. Well, and he also said there was no therapeutic benefit to the babies.

Imani Gandy: Oh, yeah. Remember, do you remember in the last episode like I, I think you made this argument that one of the things they're gonna claim for irreparable injury is that it's injuring all the babies, right? I made this, I made this statement that there are some been something like 5.6 million medication abortions and only 28 deaths.

And Jess retorted, "Yeah, but how many babies? That's 5.6 million babies that died." And that is absolutely one of the arguments that Kacsmaryk made. Absolutely. So, Jess, Cassandra of the courts, did it again.

Jess Pieklo: Self high five in the worst fucking way. Here's what I want folks to know immediately, though, as we're getting into the nuts and bolts of the law here. Kacsmaryk's order is stayed for seven days. It's paused, so nothing right now is happening with medication abortion. The status quo is right now, all the legality is there. Like, do not panic and think that all of a sudden mifepristone is gonna be yanked out of the marketplace. That's not what's happening. But this is getting teed up to absolutely be a fight that the Supreme Court steps in on sooner rather than later, potentially before the end of the summer.

Imani Gandy: Mm-hm. Yeah. Yeah.

Jess Pieklo: I said get a drink. I wasn't kidding. Oh, I was gonna say, you were talking about the statute of limitations at the start of the gates, right? At the start of this live stream.

Statute of limitations is law talk for how long you have to bring a lawsuit. Like, the courts don't want people sitting on their rights. The courts doesn't want people just like, you know, oh, I could sue this person, but you know what, I'm gonna wait a cool 20 years while evidence degrades, people forget things. Like, also, people just need some certainty in life. We need some fuckin' certainty. Well-

Imani Gandy: We need some certainty. Well, there will be no certainty here because, honestly, I wrote a whole timeline out of the petitions that were filed and the applications that were filed to the FDA and how long it took the FDA to rule on them and it's a clusterfuck.

Jess Pieklo: It is.

Imani Gandy: Like it would take me ten minutes to sit here and describe it to you so I'm gonna avoid doing that even though I really, really want to because there is no way that this judge could have found that the statute of limitations hasn't run. There's just you're gonna have to take my goddamn word for it. There is no way.

Jess Pieklo: We'll put a timeline together for the people and show it to you.

Imani Gandy: I'll show it to you. But then at the end, all of that doesn't matter because equitable tolling of the statute of limitations. That's just vibes. That just means for whatever reason, because it's not fair that the statute of limitations has run that we can go ahead and just reopen it. No big freakin' deal.

It's just, they had six years to file the lawsuit. They took 23. That's the end of it. And there's nothing that the FDA did in the meantime that opened up the question such that the statute of limitation would've been paused.

Jess Pieklo: Oh, but we got a brand new Supreme Court in that time, Imani.

Imani Gandy: Yeah, we sure do. We sure do. Oh my God.

Jess Pieklo: All right.

Imani Gandy: Can we talk about standing?

Jess Pieklo: Yeah, let's talk about standing. And for folks dropping chats in the- We are getting to Washington, too. We will. 'Cause shit's poppin'. Anyway.

Imani Gandy: Shit is popping off. Pew, pew, pew, pew, pew, pew. So go ahead, standing. I'm gonna leave it to you 'cause I'm honestly gonna have an aneurysm.

Jess Pieklo: Okay, so standing is also one of these procedural rules that we have in terms of who can and can not bring a lawsuit, right? Like, and I mean, I immediately went to any random motherfucker standing from the Texas SB 8. That's the bounty hunter law that the Supreme Court let take effect. So standing, usually to have standing to bring a lawsuit, you have to have engaged, have some kind of injury, right? Like, Imani has to break a contract that she has with me so I can sue her, right? Like, here-

Imani Gandy: Or imminent injury, right?

Jess Pieklo: Or imminent injury. Like, something that's like really about to happen. Like, I know for a fact she's about to break this contract so I'm gonna go file a lawsuit preemptively. Here, the plaintiffs are, as Imani said, a group of activist doctors who aren't even practicing in Texas, right, advocacy orgs, and their potential future preggo clients.

Imani Gandy: I mean-

Jess Pieklo: Those people don't even exist.

Imani Gandy: They don't exist. He's conferred standing to hypothetical people, right? So here's the thing. There's organizational standing, right? Like, if the NAACP sues for police brutality, right? The NAACP is suing on behalf of its members. Obviously its members have standing 'cause the members are Black and they're protesting, you know, they're filing a lawsuit about police brutality against Black people. Here, the argument is that these activist quote unquote, "Pro-life doctors," form a coalition and that coalition itself has standing, which, they don't practice in Texas. Why do they, why? Why are they filing in Texas? They don't even have any evidence that a patient has come to them with any complications.

So the organization has standing, the individual doctors have standing, and here's their argument. Their argument is that chemical- quote unquote "chemical abortions"-are so dangerous and produce so many complications that their doors are going to be flooded with all of these "Post-abortive women" who are gonna be crying and whining and bleeding out all over the floor. And when those women come to them in their time of need, they're going to have to drop their other patients and their other patients are gonna suffer, so that opens them up to malpractice liability.

On top of that, remember these are quote unquote, "pro-life activist doctors," so by having to treat these women who are bleeding out all over in their clinic or in their doctor's office, they're going to have to go against their pro-life nature, their beliefs. They're gonna have to traumatize themselves by performing an abortion in order to finish the medication abortion. Okay, let me- Oh, oh, oh, and then third, organizational standing- the doctors have standing-and then third, these potential patients who have had such horrible complications for medication abortion, that it has caused them to go into the doctor's office of a pro-life doctor and say, "Hey man, I just had an abortion. I just self-managed an abortion and it got fucked up. Can you help me?" Who in

their right mind is going to go to any one of these motherfuckers for doctor's care, for medical care? Like, and even if that were to happen, it hasn't happened yet. It hasn't happened yet and there's no immanency. There's no danger of it about to happen. It's pure speculation. So Article III standing, that part of the Constitution? Just vibes. Ain't no thang but a chicken wang. Did I just say that?

Jess Pieklo: The actual harm that would happen to patients should the FDA undergo a process of removing mifepristone from the market is real.

Imani Gandy: Really fuckin' real. And it's just-

Jess Pieklo: It's, it's so bad. So are we gonna talk about Comstock?

Imani Gandy: Please. I mean, I guess. No, wait, first we should talk, before we get to Comstock, can we talk about the idea that even though they didn't exhaust their claims administratively, it doesn't matter because the FDA was going to reject their claims. So what's the point of exhausting these remedies? Like, we're just- It doesn't-

Jess Pieklo: Functionally, like, Kacsmark is like, yeah, you know what guys? The fix is in with the FDA. That's basically what he said.

Imani Gandy: Right. We can ignore the rules of administrative procedure.

Jess Pieklo: Yeah, because we know how they're gonna rule anyway, so.

Imani Gandy: Right, the FDA are a bunch of fuckin' woke ding dongs. That's really, you know. This woke administrative agency, we don't have to pay attention to what they say. Jesus Christ. Comstock, hit me.

Jess Pieklo: I mean, you know, I think the TLDR is that, you know, rules for thee and not for me, right? Like, truly conservatives will do whatever. And yeah, Comstock. Lisa Needham wrote an amazing piece on Anthony Comstock and you know, [how he's basically the precursor to Sam Alito](#). We've got it up on the site. I highly recommend folks go read it. But this is a 18th, a 19th century morality law that said basically like no porn, no information about sex. Don't post it, don't mail it, don't do any of it. And Congress never got around to taking it off the books, which is kind of a problem. I mean, but also, frankly, they were busy with other things and maybe didn't imagine that the anti-choice community would, in some fever dream, decide to reanimate this law and use it as a way once there was a federal judiciary that was friendly to their cause to attack abortion nationwide.

Because what the Comstock Act does is create a vehicle for this Texas judge to try and tell attorney generals and administrators in states that have not regulated medication abortion out of existence, what it can and cannot do. It's terrible. It's also straight up anti-birth control. So when Imani and I are out here telling you that they're not gonna stop with abortion, they weren't

stopping at Dobbs to leave it to the states. This is their first attempt to take abortion back to the Supreme Court since Dobbs, and what are they going for? A national ban, people. They're lying liars who lied. So yeah, this like, you know, morality law is now a new weapon for the anti-choice community, for folks like Jonathan Mitchell to try and go after folks who are providing care, who are mailing abortion pills in the future.

Imani Gandy: And while I'm freaking out about all of the administrative fuckery that's gone on, they did not raise the Comstock Act claim before the FDA, right? You have to, you have to-

Jess Pieklo: Details, details, Imani.

Imani Gandy: You gotta go to the FDA and be like, I don't like Mifeprex and here's why and then you have to, then the FDA says something and then you say something and then after you've been, like, the FDA has said no more, that's when you can go to the courts. They didn't even do that.

Jess Pieklo: Nope.

Imani Gandy: Who cares? It doesn't matter. Oi vey.

Jess Pieklo: Nope. So this decision, the immediate effect of it has stayed, is on pause for seven days. That allows the Biden administration to seek an emergency appeal with the Fifth Circuit Court of Appeals. We anticipate that they will. They're probably working up, if not have already got that in draft to file right now. Meanwhile-

Imani Gandy: Meanwhile in Washington. Like, what the fuck, man? It's a civil procedure nightmare. I normally should be excited, but this is just too preposterous for me to even contemplate it.

Jess Pieklo: I feel attacked.

Imani Gandy: I do feel attacked. I feel attacked and I love civ pro, and I had Amy Wax as my professor. So tell us what happened in Washington today.

Jess Pieklo: So in Washington, in federal district court in Washington, a group of Democratic attorneys general had filed what could be considered a competing lawsuit in some ways to the Texas lawsuit. They also sued the FDA and you may be thinking that's a little weird. Why would Democrats sue the Biden administration? Well, because they were looking for an order from the court to say, hey FDA, you've done some things to expand medication abortion access during the COVID pandemic. You can't now change them. That status quo has to stay the same, at least for the plaintiff states.

And so there's a handful of states that joined that litigation. Well, today, just as we are all freaking out about Kacsmaryk's decision, here comes the Federal District Court of Washington

that says, hey, hold up, hold up FDA. You cannot change course. Fuck that guy in Texas, functionally, is what that order says. You can't do anything for the plaintiff states. So this has set up an immediate contradiction between two federal courts. Can Kacsmaryk tell the state of Washington, for example, that it needs to abide by an FDA decision that, you know, starts the process of unwinding approval? Can Washington tell Texas to get bent? These are the things that we are gonna probably find out sooner rather than later.

Imani Gandy: I'm sure our listeners and viewers want to know how it is in the first place a federal judge in one state can issue an injunction that affects every single state. Like, we've seen that, you know Reed O'Connor tried to do that with the ACA and DACA, but like, can you explain for some maybe new people who just can't figure out why one motherfucker in Texas can do this, can basically attack the human rights of half of the people in this country?

Jess Pieklo: Yeah. I mean, it's a really good question. Basically, because we've kind of said that some federal courts can, you know? Now Republicans and conservatives have really taken the idea of a nationwide injunction to the extreme. As Imani said, there are a couple federal district judges that, especially during the Obama administration, would, like, issue an injunction left, right, and center.

Like, you needed a policy blocked? You don't like health care for trans folks? Well, go to Reed O'Connor and he'll gum up section 1557 of the ACA. Democrats used it to some effectiveness in the Trump administration on things, initially, like the Muslim ban, but ultimately the Supreme Court is the Supreme Court. So, you know, what are you gonna do there? The question is really how far can one federal court's power reach? And normally one district court judge can only reach into their district, and, like, if a second district court judge comes up with a different ruling, well then that's the job of the federal appellate court- in that case, would be the Fifth Circuit- to figure that out. All bets are off.

Rules don't matter anymore. It's vibes. It's just power grabs.

Imani Gandy: And it's coming to a head, right? Because Texas is gonna go to the Fifth Circuit, the Texas case is gonna end up in the Fifth Circuit, the Washington case is gonna end up in the Ninth Circuit. That creates what we nerds like to call a circuit split. And one thing the Supreme Court, well, in normal times, one thing the Supreme Court likes to do is have uniform law. That didn't seem to apply the whole year before Dobbs. Because the law in Texas was that abortion was banned and then the law in every other state was that it wasn't. But-

So that's how this case is going to end up before the Supreme Court, as Jess said, possibly before the end of this term.

Jess Pieklo: Yeah. Everybody will be filing emergency petition, or emergency applications for review. And what we've seen from this Supreme Court, in particular, is a willingness to jump in on these emergency petitions and put their thumb on the scale. So in the normal times, this

whole fight over what the FDA can and cannot do should take years to sort out, given the types of claims, the evidence that folks are pretending is there in support of their claims.

Imani Gandy: Okay, first, wait, wait. First of all, you're talking about evidence in support of the claims. This guy is listing studies from people who aren't doctors, aren't in the health-care field at all. David Reardon, who is cited for an article entitled, "Deaths associated with pregnancy outcome: a record linkage study of low income women," in a medical journal. That guy is an electrical engineer. He's an electrical engineer. I mean, Priscilla Coleman, another person who is known. Like, the actual article cited by Priscilla Coleman has been debunked over and over more than a decade ago.

So I, you know, I talk about junk science and the ways in which courts are allowing junk science to rue the day? This is what I'm talking about. Allowing people with electrical engineer degrees decide the bodily autonomy of half the people in this country. I'm good. I'm all good. I got my canned margarita. I'm good.

Jess Pieklo: It's, it's wild. But yeah, I mean even that junk science, though, it should take years to air that out, right? The Prop 8 trial way back when the marriage equality fight was at the states, there was plenty of junk science there, too. Had an actual trial to air that out. Guess what happened? It didn't hold up to light. That's what should happen here. But by doing all of this procedurally, anti-choicers can just screw process, right? Doesn't matter. They just, it's outcome determinative at this point.

Imani Gandy: Ugh. I mean, look, we're at 21 minutes. And I feel like maybe we should just let these people go have drinks.

Jess Pieklo: I mean, look, you know, here's the reality. Rewire News Group will be on this story for the entirety. And check out our Instagram. We have an explainer reel there, also, that's got like some of the top lines. We're on Twitter, we will have follow up analysis. You know Imani and I have more to say. There is, the reality is this fight just got amplified to new and legally and actually dangerous ways for folks, so-

Imani Gandy: And that is because medication abortion is the future, right? You know, in our last episode about this, Jess said, you know, they cannot ban abortion without going after medication abortion. And that's why they're acting as if medication abortion, as if mifepristone, is as harmful as fucking fentanyl.

I mean, it's really that absurd. And here, I'm just gonna give you a couple stats before we let you go. According to Guttmacher in 2020, 54 percent of abortions were medication abortion. That's why they have to go after medication abortion. It's hella safe. Like, I've said that so many times. It's super safe. It's more safe than Tylenol. And if you wanna think about what this court has just said, this court has just said that if a doctor thinks that a drug is dangerous, then someone who comes into their office with a complication resulting from that drug, that means that the doctor can ask the FDA to unapprove that drug. Like, that means a doctor could feasibly ask the FDA



to unapprove Tylenol because little Timmy got an ulcer. We're in uncharted territory, folks, like, uncharted territory.

Jess Pieklo: Yeah. It's bad. But medication abortion is still legal. It's still super safe as Imani said. We know the fight is continuing. We will provide you complete coverage. Also, a couple pointers, you don't have to tell your health-care providers anything. If you show up to an emergency room or to a clinic and you're having a medical event, you're allowed to keep your mouth shut.

Imani Gandy: Or, or you can just say this, "I think I'm having a miscarriage." And that's it. Don't tell them you took anything because health-care workers are snitches. And particularly if you're brown or you're, you know, you're trans, for example, or you're low-income, they will snitch on you.

Jess Pieklo: Yeah, I mean, you know, we know there are some good ones out there, but just a reminder, health-care workers are not agents of the state. They do not have to do law enforcement's job for them. It is our job to take care of each other and ourselves.

Imani Gandy: Yes. And I absolutely did not mean any shade to the amazing abortion providers who are out there. You, come on, y'all. You know, I think y'all are heroes.

Jess Pieklo: They know, they know.

Imani Gandy: Just absolute heroes. And on that note, Jess, I'm gonna go crack open another canned margarita because this is just, we have devolved so quickly from Dobbs that, you know, we knew it was gonna happen and we told our listeners it was gonna happen, but it still feels like a gut punch to the stomach.

Jess Pieklo: Yeah. I mean, you know, we are not even a year out from the Dobbs decision and we are staring down at the possibility that the Supreme Court is stepping right back into the abortion fight.

Imani Gandy: Yep, and it was supposed to be left to the states. I thought we were leaving it to the states. That's what I was told. I was told we were leaving it to the states.

Jess Pieklo: Never leaving it to the states.

Imani Gandy: Never leaving into to the states. On that note, you know, follow me on Twitter, @AngryBlackLady. Follow Jess on Twitter, @Hegemommy, H-E-G-E-M-O-M-M-Y. Follow Rewire News Group on Twitter and on Instagram, and subscribe to our YouTube channel because that's how you're gonna know when we do these live streams and we're gonna start doing them more frequently because SCOTUS season, sweaty SCOTUS season is coming up and you know how sweaty that makes us. And we're like perimenopausal now, so it's like extra sweaty.

Jess Pieklo: There we are. Everything's sweaty. Thank you, folks, who, those of you who are able to hop on live with us at the on the turn for, you know, a huge moment like this. Like, I said, we will be back with more. And in the meantime we will see you on the tubes, folks.

Imani Gandy: See you on the tubes, folks.