

This transcript is a version of the episode.

Imani: Hello fellow law nerds! Welcome to another episode of Boom! Lawyered, a Rewire News Group podcast. I'm Rewire News Group's Editor at Large Imani Gandy.

Jess: 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 and the Boom! Lawyered podcast is part of that mission. A big thanks to our subscribers and welcome to our new listeners

The Supreme Court is set to hear oral arguments next week in *FDA v. Alliance for Hippocratic Medicine*, the case that will determine whether or not medication abortion access will be rolled back to levels we haven't seen since the Clinton and Obama years.

Imani: We've been covering this case for over a year now, and we have done multiple podcast episodes on it, which you should check out. Today we're going to talk about what we're going to be looking for in oral arguments next week.

Jess: We have to talk about the role of science in this case. Science tells us that mifepristone is wildly safe. The complication rates for medication abortion are low.

- One study found that the overall complication rate of medication abortion after an appropriate in-person evaluation is 5.2%, with the majority of documented complications being minor issues.
- The rate of major complications is 0.31 per 100 abortions.
- Another study analyzed data from more than 50,000 women and concluded that major complications are rare, occurring less than a quarter of a percent of the time. That's comparable to the frequency of complications from colonoscopies.
- According to a Times report that looked at the studies being cited in this lawsuit, abortion pills are about 95 percent effective but 3 to 5 percent of patients need an additional procedure to terminate the pregnancy. But these aren't usually serious situations.

Imani: But that hasn't stopped antis from reframing medication abortion as "chemical abortion" that is super dangerous to women and girls. It also hasn't stopped anti-abortion junk scientists from wielding studies that later need to be retracted due to bias and unsound scientific methodologies about how mifepristone is dangerous. We did an episode about this and you should definitely check out our TikTok series on these clowns: Ingrid Skop. George Delgado. Priscilla Coleman. These are people who are not well respected in the scientific community. Their studies have been debunked. Courts have found their testimony to be unreliable in other lawsuits.

And yet will the Court even acknowledge that the lower court rulings were based in part on these junk science studies? Will the supreme court acknowledge that these studies have been retracted or not?

Also what role do these studies even really have in this lawsuit as it is styled right now. Because remember, this isn't about whether miffy is safe. That part of the case was tossed out. It's about whether the protocol changes caused extra harm to these doctors. None of the studies have anything to do with the level of extra harm caused to these doctors by the FDA protocol changes. So do we just ignore these studies? What does that mean for repro health in the courts in the future?

We should talk about the Comstock Act. What is going on with this zombie statute's resurgence in popularity?

Jess: I'm going to answer your question with a question. Did you know that laws can be repealed?

Imani: I don't know what you mean.

Jess: Well, just that laws can be repealed.

Imani: I'm not sure I follow. Once Congress passes laws, that's it. There's nothing anyone can do. We just all have to live by those laws for eternity, right? Even if we hate them?

Jess: Actually no. That's not correct. Congress can literally repeal laws.

Imani: Oh yeaaaah! Repealing a law! That's a thing that people do. So since we both agree that laws can be repealed, I have a question for every Democrat except for Elizabeth Warren:

What the fuck, man?

Congress passed the Comstock Act in 1873 as an anti-obscenity bill. Initially, it was used primarily to criminalize birth control. Maggie Sanger, our birth control granny, went to jail under the Comstock Act for peddling birth control out of an unmarked white van.

As much as we all know that Margaret Sanger was ride or die for birth control (and I just did a pretty great TikTok about it, which you should check out), Anthony Comstock was ride or die against birth control. He wrote an anti-obscenity bill, and in 1873, Congress

passed the law. The law criminalized mailing, possessing, or selling "obscene, lewd or lascivious" materials, which means items used for abortions cannot be mailed across state lines.

Jess:

- Anti-abortion groups want the president to enforce the federal Comstock Act of 1873 to ban abortion pills or potentially all abortions
- A president could reinterpret and enforce the Comstock Act through the Department of Justice
- Enforcing Comstock would impact abortion access in every state, even those protecting abortion rights
- It could allow prosecuting women for possessing abortion pills

Imani: That all sounds truly terrible. So Jess, why aren't Democrats doing anything about it?

Jess: Well, Liz Warren fired a pretty weak warning shot. Here's what she told Susan Rinkunas at Jezebel:

"Donald Trump and Republican extremists aren't shy about their plan to use the dormant Comstock Act of 1873 to ban abortion nationwide. No matter what Trump and Project 2025 might say, the Department of Justice has made clear that Comstock does not prevent the mailing of medication abortion. If the Supreme Court makes an extreme decision that finds otherwise, then Congress has a responsibility to protect Americans' reproductive health care and respond."

Imani: OK but why do Democrats need to wait for the Supreme Court to issue a ruling in this case in June? That will have been a full 18 months since abortion rights advocates first started advocating for the repeal of this bill? That's number one. Number two is: Liz. Child. Please. What are you talking about "if the Supreme Court makes an extreme decision." Frankly it would not be an extreme decision for the Court to uphold a statute that you and your colleagues have not yet repealed. As much as I loathe this Court, you can't put that on them.

Jess:

- Biden needs to talk about executive actions he's willing to take if any to protect abortion access
- He's got to stop pretending that codifying ROe is a thing that can happen without Democrats controlling Congress and a filibuster in place.

Imani: We also have to talk about standing. Just briefly. We've both yelled about this a lot—about how what these doctors are claiming amounts to grievance standing.

Jess: Right. Well the Fifth Circuit ruled that this group of Christian doctors and dentists had standing to sue the FDA because, essentially, abortion makes them sad, and mifepristone causes complications that may land preggos in the emergency room where one of these Christian doctors will be forced to perform an abortion against their will even though there are conscience clauses in place that prevent a person from having to do that.

Imani: But let's pretend it's a rural hospital and only one doctor is on call and happens to be Dr. Jebediah Christianguy. There's a possibility that some of those 5.2% of cases where a further procedure is needed to terminate the pregnancy will land in Jebediah's care and terminating that pregnancy would really make him sad, y'all. Jeb really likes pregnant women. He finds them aesthetically pleasing.

Jess: The Fifth Circuit found that Jebediah has standing based on declarations from doctors who are trained by anti-abortion advocacy organizations to testify in abortion cases. Doctors like Ingrid "I'm not very good at research" Skop, who has claimed that the FDA protocols expose women to a higher likelihood of undetected serious complications.

Imani: Yeah. She has claimed that. So have Drs. Delgado, Harrison, and Francis (the other declarants who are cited for this proposition that the new miffy protocols are causing extra harm to christian doctors)

But I have a question: Where's the evidence of that? If that's true, there should be studies. But there aren't. All we have is the word of these dodgy doctors and their dodgy studies that end up being retracted because they are garbage.

Jess: It's gonna be good enough for Sam Alito though. And that's what matters.