

## Boom! Lawyered 202: Every Terrible Anti-Choice Bill Coming to a State Near You

- Imani Gandy: Hello fellow law nerds. Welcome to another episode of Boom! Lawyered, a Rewire Radio podcast hosted by the legal journalism team that would email you chocolate chip cookies if we had that technology. I'm Imani Gandy.
- Jess Pieklo: Andy I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social justice news, commentary, and analysis on the web, and the team legal podcast is part of that mission. So thank you so much for listening and subscribing.
- Imani Gandy: Yes. Thank you. We really appreciate it. And today, we're going to delve into some of the state abortion restrictions that are teed up in 2018. We're also going to explain some of the legal strategy behind the latest attempts to undo *Roe v. Wade*. And, and this is huge, you get to meet Rewire's research assassin, Brie Shea.
- Jess Pieklo: Well, it's a new year and with it comes a whole new set of abortion restrictions anti-choice lawmakers plan to trot out. We're already seeing fetal homicide bans, 20 week abortion bans, 15 week abortion bans, D and E abortion bans, and even total abortion bans.
- Imani Gandy: That's a lot of bans.
- Jess Pieklo: It's so many bans.
- Imani Gandy: It's one ban too many, I'd say. And if there's one person at Rewire who knows about all of the bans, all of the bans, like literally, all of the bans, it's our database ... It's our database whisperer, Brie Shea. When it comes to the types of abortion restrictions that are out there and which state is trying to pass what garbage, there's probably no one in the entire country that knows more about it than Brie, and that's not an exaggeration.
- Jess Pieklo: Not fake news.
- Imani Gandy: Not fake news, all live, real, true news. So please give a warm welcome to Brie. It's okay to clap wherever you are, unless you are in your car driving, in which case keep your hands on the wheel. So Brie, hello.
- Brie Shea: Hi. Thanks for having me. That was quite an introduction.
- Imani Gandy: Well, you're quite a research assassin. So tell us. What's up with all of these bans, Brie?
- Brie Shea: Okay. Where to start? We're about a month in, like you said, to the new year. We have basically over 100 anti-choice bills so far.
- Imani Gandy: Yikes.

Brie Shea: It covers everything from targeted regulation of abortion providers to funding restrictions. But we're going to talk about the bans. So fetal homicide, we have about six states which have introduced fetal homicide bills. Three of those states, Indiana, New Hampshire, and Virginia, relate to crimes affecting a fetus. While four of those states, Indiana, Kentucky, Mississippi, and Missouri are basically just total abortion bans.

Jess Pieklo: So let's talk a second about the crimes relating or affecting a fetus. What do you mean by that?

Brie Shea: Basically if there's any crime that happens — manslaughter, any kind of a misdemeanor or an assault charge — but if it affects, if it harms a fetus in any way, these bills will either create a new law for that, or they will provide increased penalties if it doesn't just harm the pregnant person, it harms the fetus.

Imani Gandy: So if there was like a car accident, if I plowed into a car and a pregnant person is driving and that person loses the baby as a result, I can get an increased penalty for harming not just the person, like the person driving, but that person's child or unborn baby, as anti-choicers like to say. Is that correct?

Brie Shea: Right. Exactly.

Imani Gandy: Okay.

Jess Pieklo: But then there are these bills that you said are total abortion bans. What do these look like besides disaster?

Brie Shea: That's pretty much accurate right there, disaster. They're complete abortion, no matter what. I know I said Indiana, Kentucky, Mississippi, Missouri right now. Missouri always has them. I also want to add, Oklahoma might be on that list. I don't want to say for sure.

Jess Pieklo: Super.

Brie Shea: But they always have one, at least one every year. And they have right now three or four bills that there's no text involved.

Imani Gandy: Wait. What?

Brie Shea: But there are titles.

Imani Gandy: Wait. So there are bills that—

Brie Shea: They do this all the time.

Imani Gandy: So they just file blank bills and then fill in the blanks later.

Brie Shea: They file blank bills, yeah, with a title. And the titles are Eliminating Abortion Act of 2018. Or what's another one? Oklahoma, Anti-Abortion Act of 2018. So I'm fairly certain those will be fetal homicide, just total abortion ban. It's prohibited in any case. Doesn't matter if it's an emergency or not. Any medical emergency, rape, incest, it's just still going to be prohibited and normally there's a felony involved.

Jess Pieklo: They're probably filed blank too because they're just waiting to copy and paste from Americans United for Life or something. Like they just don't actually have that language yet.

Brie Shea: Yeah. There's a lot of Mad Lib bills. That's what I like to call them. It's just fill in the blanks. You know? It's very frustrating and irritating.

Imani Gandy: What other kind of bans are we looking at this year Brie?

Brie Shea: We also have mentioned, we have some D and E bans again.

Imani Gandy: D and E stands for?

Brie Shea: Dilation and evacuation, which is the common second trimester procedure. We have three states right now. I think it's Colorado, Florida, and then our anti-choice Democrats out of Rhode Island. They've all introduced bans this year.

Jess Pieklo: Any Rhode Island Democrats, call your people and please-

Imani Gandy: Honestly. What is going on there?

Brie Shea: I don't understand that state.

Imani Gandy: Well, I do because actually my best friend from law school's from there, but I don't understand the politics. I do understand the ocean.

Brie Shea: And we also have a couple fetal heartbeat bans again.

Imani Gandy: And those are? Are those basically like the six week bans essentially?

Brie Shea: Yes. The six week, yeah. As soon as you can detect a fetal heartbeat, which can be as early as six weeks. Mississippi, Missouri, and Tennessee want to ban abortion at that point.

Imani Gandy: Lovely.

Jess Pieklo: It seems like maybe Mississippi and Missouri are some repeat customers here and are looking to ban abortion any way, shape, or form they can.

Brie Shea: Oh, yes. Every year, every single year it's Mississippi, Missouri, Oklahoma, I think are the top three.

Jess Pieklo: I know it's early to say trends and stuff. But what are a few things that are jumping out? Because you've mentioned we already have a whole, whole load of bills filed and pre filed so far this year.

Brie Shea: Mm-hmm (affirmative). So far I think ... Yeah. It's still pretty early, but I think maybe later ... Bills with later abortion or anything around later abortion, doesn't necessarily have to mean it's prohibiting. But that seems to be the most right now. We have a lot of TRAP bills, but that's just kind of all over the place sometimes. But I know that even in Congress is pushing, I believe, the Born Alive Infant Protection Act right now. And states seem to be copying that. So we have, I think, five. I think Alaska, New Jersey, New Mexico, Rhode Island, and West Virginia have a similar bill to what's happening in Congress with the Born Alive Infant Protection Act. But then we also have three states, Maryland, New Hampshire, and New Mexico, who are trying to ban abortion at viability.

Imani Gandy: When you say "ban abortion at viability," do you mean before viability or as soon as viability attaches, whatever that determination is by the doctor, then they ban abortion at that point?

Brie Shea: Yes. At that point. And some of them specify. Sometimes they'll specify viability is at 24 weeks. But other times they won't, and they'll just kind of leave it up to interpretation or what the physician decides is viability or thinks, or determines, however they determine it to be.

Imani Gandy: Got you. Got you.

Brie Shea: There's quite a few bills in that area, so it's leaning towards that, at least this year.

Imani Gandy: Oh, wonderful. Is there anything else that we should be keeping an eye out for, anything new this year?

Brie Shea: We do. We have Mississippi. Mississippi decided to, with the help of I believe, Alliance Defending Freedom, they have introduced a 15 week ban.

Imani Gandy: A 15 week ban. Are they just pulling numbers out of a hat at this point or what?

Jess Pieklo: They might be. For our listeners who might not be in the know, Alliance Defending Freedom is a litigation mill. They typically bring lawsuits or help defend these kinds of restrictions. They have not historically, at least not real visibly, been in the business of pushing legislation, so this is something that's remarkable and I think important to pay attention to.

Imani Gandy: And I think just to tack onto that, we're seeing some of the folks at ADF are popping up in the Department of Health and Human Services, so I imagine that

might be part of the reason that ADF is getting into the lobbying business and not just sticking to their normal litigation against abortion and whatnot.

Jess Pieklo: Yeah. ADF and the Trump administration have a real cozy relationship, so it'll be interesting to see what happens in Mississippi with this.

Imani Gandy: Probably nothing good.

Brie Shea: Nothing good.

Imani Gandy: Anything else that you want to talk about, Brie? Any other questions we have for her, Jess?

Jess Pieklo: How do you ... No. I don't actually want to get into ... I was going to ask you how you just managed to deal, and then that starts to sound really sad.

Imani Gandy: What is your life like?

Jess Pieklo: It's amazing, ridiculous, all of the above to me, that we are just barely into 2018 and we already have all of these kinds of laws on the books and introduced. And we know that there's going to be more down the pipes. I just want to say thank you for stepping out from behind the curtains of the legislative tracker and helping explain all of it that we've seen so far to our listeners and also say thank you for all of the amazing work that you do for us at Rewire because, seriously listeners, Brie is the magic that makes things happen, so yay, Brie.

Imani Gandy: Yay, Brie.

Brie Shea: Too kind. Team effort.

Imani Gandy: Team effort. Team Legal. Woo-hoo!

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Jess Pieklo: Oh my God, Imani. We are not even a full two months into 2018 and republicans are full on gangbusters with these abortion restrictions that we all know should be ruled unconstitutional.

Imani Gandy: Yeah. They should be, but they don't really care because their game is to end Roe, or at least render it totally useless.

Jess Pieklo: Right. I mean, Republicans talk a lot about overturning *Roe v. Wade*. They talk about it all the time. Trump promised Supreme Court justices that would do just that. And with these new restrictions, anti-abortion advocates are certainly searching for their test case to see if they can end legal abortion. But before we can talk about conservatives latest strategy to try and gut abortion rights entirely, we should probably give some background on the legal hurdles they have to clear first.

Imani Gandy: Good idea. Okay. So everyone probably remembers *Whole Woman's Health v. Hellerstedt*. Right? That's the 2016 Supreme Court case involving Texas's TRAP laws.

Jess Pieklo: Let's walk through it just a little bit though. What happened in *Whole Woman's Health*?

Imani Gandy: Okay. Whole Woman's Health is a clinic in Texas operated by the extraordinarily bad ass Amy Hagstrom Miller. That clinic challenged a couple of provisions in one of the most sweeping abortion bills in the country, Texas HB2. The bill required, among other things, doctors to maintain admitting privileges at a local hospital, which is preposterous because as we all know, we don't really follow the country doctor form of medicine anymore. If you have some sort of complication due to an abortion or due to anything, the EMT will show up at your house and take you to the nearest hospital. They're not going to necessarily take you directly to your specific doctor.

But also, the bill required clinics to be retrofitted to serve as ambulatory surgical centers, which are basically mini hospitals, even though abortions are an extremely safe procedure, and even if the clinic only performs medication abortions. So to describe how ridiculous this is, sometimes these clinics would be forced to pay millions and millions of dollars to, for example, widen their

hallways so that two gurneys could pass by as they do in a hospital. But if you're doing medical abortions, there's no surgery. There's no gurney. There's no point.

Jess Pieklo: Yeah. I mean, other requirements were things like, put a water fountain in each exam room. You know? Think about this. If you're in an older building, which a lot of these clinics were, that's ... You mentioned millions of dollars, some of that's also just not architecturally feasible. You're not taking down the whole damn building.

Imani Gandy: Right. And what do need a water fountain for? Just get one of those Sparkletts water coolers or something. Or just provide bottled water. These restrictions or these regulations are clearly intended to target abortion providers and to put them out of business. And Texas claimed that the legislation was for the purposes of protecting the health and safety of pregnant people. But the Supreme Court in *Whole Woman's Health v. Hellerstedt*, said no because Texas couldn't show that trying to close clinics, which they full on admitted they were trying to do, they couldn't show that trying to close these clinics actually helped patients.

And in keeping with her usual awesomeness, Ruth Bader Ginsburg said, "Laws that do little or nothing for health, but rather strew impediments to abortion cannot survive judicial inspection." In other words, if a state says that a restriction promotes women's health and safety, that state is going to have to prove that to the courts. Now this case was a big loss for anti-choice advocates, and it seems that this year they have changed tactics. This new round of legislation is not necessarily about protecting women's health and safety. But this legislation has lawmakers arguing that they are passing these laws to promote the state's interest in advancing fetal life.

Jess Pieklo: Whoa. Hold up. States have a legal interest in advancing fetal life?

Imani Gandy: Yes, they do. We talk about the right to an abortion in *Roe v. Wade*, but the decision says a lot more, including that states can legislate to "advance potential life." We should walk through *Roe* a little bit. Don't you think?

Jess Pieklo: Yeah. That's a good idea.

Imani Gandy: Okay. So *Roe* says that a person has the right to choose to have an abortion before viability without undue interference from the state. That's where we get the legal holding that a state can ban abortion before viability.

Jess Pieklo: Legal holding, listeners, is lawyer talk for rule.

Imani Gandy: Right. So *Roe* also gives us some language on what the courts mean when they talk about fetal viability, kind of. *Roe* says viability means potential of the fetus to survive outside the uterus after birth, and not just for a second or two. Survival outside the pregnant person can also include surviving with the assistance of technology, like a respirator for example. *Roe* says that after viability though,

states can pass laws that restrict abortion access so long as those restrictions contain some kind of exception for pregnancies that put a person's health and life at risk.

Jess Pieklo: Okay. That was a lot, so let's recap a little bit. First, states have an interest in protecting both the health and safety of a pregnant person, and they also have an interest in advancing fetal life. States can't ban abortion before viability. They just can't. But states can ban abortion after viability if there is some kind of exception for the life of a pregnant person. And that, listeners, is *Roe* in a nutshell.

Imani Gandy: So we should probably talk about another Supreme Court decision, *Gonzales v. Carhart*. Now when I say that *Gonzales* was a disaster of a ruling, that's an understatement. *Gonzales* was a challenge to the federal "partial birth abortion ban."

Jess Pieklo: Wait. Why did you say, "Quote, unquote"? What's the scare quotes?

Imani Gandy: Well, because partial birth, quote, unquote, partial birth is a non medical term that anti-choices concocted in order to make the procedure at issue, what's called intact dilation and extraction, sound particularly horrible. So *Gonzales* is the decision that made junk science a thing in abortion regulations. So basically what happened is that Nebraska passed a dilation and extraction ban, a "partial birth abortion ban" in an effort, essentially, to stop one provider, a doctor named Leroy Carhart, from performing this type of procedure. The Nebraska law didn't have a health exception, and if there's one tenet of abortion jurisprudence that the Supreme Court holds dear, or at least it did, and we'll explain that in a minute, it's that abortion restrictions must have a health exception.

Jess Pieklo: And the Nebraska statute didn't have one.

Imani Gandy: Right. It did not have a health exception. So Dr. Leroy Carhart challenged the law, and in 2003 in a case called *Stenberg v. Carhart*, the Supreme Court struck down Nebraska's law. Now I'm going to give you one guess as to why that is.

Jess Pieklo: Because it didn't have a health exception and you need a goddamn health exception?

Imani Gandy: Bingo. And at this point, anti-choicers had their knickers in a twist about D and X bans, these so-called partial birth abortion bans, and they made such a fuss about it that the same year the *Stenberg* decision came out in 2003, Congress passed the "partial birth abortion ban act." And Dr. Carhart immediately challenged it. I'm going to give you a guess as to why.

Jess Pieklo: Oh my God. I think I've got it — because it didn't have a health exception.

Imani Gandy: It did not have a health exception.

Jess Pieklo: But I thought abortion restrictions had to have a health exception.

Imani Gandy: Well, the court certainly ruled that in *Stenberg*. But as we're going to talk about in a bit, the court got it really, really wrong, really, really quickly. So I'm going to flip the script and ask you a question since, again, you are our resident court whisperer. And my question is: What the fuck? How could the court strike down the Nebraska law because it didn't have a health exception, but then uphold the federal law when it also did not have a health exception?

Jess Pieklo: "What the fuck" seems to be about the most appropriate question to ask here, because the answer is mostly hocus pocus, that's how. From a purely legal standpoint, Kennedy, who wrote the majority opinion, said the federal law was different than the Nebraska law in two important ways that made it constitutional. First, Kennedy said that Congress issued finding of fact here that supported the need for the legislation. And basically what that means is that it was enough for Kennedy and the majority that Congress had held hearings and decided that it wanted the legislation. And this is important because those hearings had experts testifying that the federal ban was not grounded in science and would in fact hurt patients.

Kennedy and the majority said that didn't matter though, and that lawmakers were free to choose sides in the abortion debate and legislate accordingly, so long as whatever findings of fact they had could explain that choice. We'll talk more about why this is total garbage in a minute. But second, Kennedy also said that Congress had more narrowly defined the procedure so that it would be clear what exactly a doctor could and couldn't do in performing a later abortion. Kennedy said that this mattered because the Nebraska law was written broadly enough that it could have possibly banned both D and X, and D and E abortions, which is why it needed a health exception in the Nebraska law.

The federal law, he said, was narrower so it didn't need that health exception, even though, and this is maddening, the federal law is a pre-viability ban and abortion rights law clearly says no pre-viability bans without an exception. But really, honestly, the difference is Kennedy writing the majority opinion. He's not a fan of abortion at all, and that fact is apparent all over the decision, like this little tidbit: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret the choice to abort the infant life they once created and sustained."

Imani Gandy: Wait. Wait. Wait. Wait just a minute. Did he actually say there's no reliable data, but that women regret aborting "infant life"?

Jess Pieklo: Yep. He sure did.

Imani Gandy: Jesus Christ.

Jess Pieklo: Yeah, so that's *Gonzales*. It's the decision that upheld a pre-viability abortion ban without a health exception and invited conservative lawmakers to gin up

whatever kind of evidence they could to support their assault on abortion rights. It's the *Gonzales* decision that really gave lawmakers the green light to go bananas legislating against abortion rights and set the stage for the kinds of bans we're seeing today.

Imani Gandy: So Kennedy essentially invited junk science into the courtroom, and he certainly signaled to anti-choicers that it might be a good idea to find some data to support his claims, and thus an entire industry of anti-abortion junk science was born, including a brand new syndrome from which millions of women were apparently suffering: "post abortion syndrome."

Jess Pieklo: What the hell is post abortion syndrome?

Imani Gandy: So these folks claim that abortion is so traumatizing that, for example, women get depressed. They have suicide ideations. They develop eating disorders, drug and alcohol abuse, and that sort of thing. They even point to studies that supposedly support the existence of post abortion syndrome. Now these aren't peer reviewed studies, of course, because the people are not reputable scientists. Many of these studies have been debunked, primarily because people like Priscilla Coleman, who is one of the leading researchers behind the completely concocted post abortion syndrome didn't control for mental health and previous experience with violence when they conducted their study. So when they conducted this study, they just asked women. Did you have an abortion and did you not have an abortion? They didn't ask women if they had any history of sexual abuse, physical abuse, emotional abuse, whether they had any preexisting mental health conditions that might make them more predisposed to suicide ideation, eating disorders, and all of these other things that were supposedly a result of abortion, but might also be the result of other issues that they didn't ask about.

Jess Pieklo: Oh my God. That's not science. I don't know what it is, but that is not science.

Imani Gandy: Yeah. It's really not science, and it's true that abortion is difficult for some women. But for some women, it's not. And it does a disservice to everyone to paint women as inherently guilty or traumatized because of some genetic predisposition to motherhood.

Jess Pieklo: These people are terrible and it's not just fake mental health syndromes that they're concocting either. For years anti-choicers have claimed that abortion causes breast cancer.

Imani Gandy: But it doesn't.

Jess Pieklo: No. No. No. No. It does not. But that has not stopped anti-choices from erecting literal brick and mortar institutions dedicated to cultivating and spreading this kind of junk science.

Imani Gandy: You know the one that annoys me the most is the Charlotte Lozier Institute, which is the research arm of the, wait for it, Susan B. Anthony Foundation. Yes, there's an anti-choice organization named after Susan freakin' B. Anthony. And now as a Black woman, I have my own issues with Susan B. Anthony, but how dare they?

Jess Pieklo: Oh my God. Seriously. There was also a push to gather women, so-called abortion survivors, to tell their stories. And then there are so-called experts who have been popping up in litigation for decades, people like Vincent Rue, to whom the State of Texas paid thousands of dollars to serve as an expert even though he had been discredited decades before.

Imani Gandy: Oh man. Vincent Rue is terrible.

Jess Pieklo: He is. He's the worst and he just will not go away. Okay, so during the trial phase of *Planned Parenthood v. Casey*, that's the 1992 case that reaffirmed *Roe* and established the undue burden test.

Imani Gandy: Wait. Wait. Wait. We should probably explain what the undue burden test is.

Jess Pieklo: Oh, that's a good call. Sure. So the court in *Casey* said that a state can't place an undue burden on the right to an abortion. And an undue burden is one that puts a substantial obstacle in front of a patient seeking an abortion. And that's basically the test for most of these state laws. Are they an undue burden? So anyway, the judge in *Casey* discredited Rue and said that his testimony was, and I quote, "Based primarily, if not solely, upon his limited clinical experience, and therefore not credible." "His testimony," the court went on to say, "was devoid of any analytical force in scientific rigor." Ouch.

Imani Gandy: Yikes.

Jess Pieklo: The court also said that Rue's "admitted personal opposition to abortion even in cases of rape and incest suggests a possible personal bias."

Imani Gandy: Wow. That's pretty damning.

Jess Pieklo: It is really damning. Courts aren't generally like ... Judges are pretty reserved unless it's really bad, and so to say something like basically calling him flat out biased is really bad. So why the hell, then, did Texas pay him a bunch of money to consult on HB2?

Imani Gandy: You know, it's amazing how far white male mediocrity will get you in this country.

Jess Pieklo: It's basically the answer. It really is.

Imani Gandy: So to recap. After Congress banned D and X abortions, so-called partial birth abortions, and provided no exception for the health of the pregnant person, the

court in *Gonzales v. Carhart* said, "Sure, that's fine." Even though three years prior, the court in *Stenberg* struck down Nebraska's D and X ban because it didn't have a health exception. And because of Kennedy's judicial intemperance, anti-choicers are clamoring to concoct as much junk science as they can to appeal to Kennedy's abortion sads, which brings us to 2018 and the lawsuits teed up to challenge *Roe*.

So we have all of these unconstitutional abortion bans floating around in state legislatures and the courts. None of them are based in arguments that the laws are designed to protect pregnant people. They have more or less lost the ability to make that argument after *Whole Woman's Health* unless they have actual real evidence to link their proposed law to advances in patient safety. So the big legal test now is just how far will the courts let anti-choice lawmakers go in legislating for the rights of a developing pregnancy over the rights of that pregnant person.

Jess Pieklo: We've got some cases in the pipeline that are going to help answer that question. All right. So there's active litigation in federal courts around both Texas' and Arkansas' D and E bans. Federal courts there have blocked those laws from taking effect, but the very conservative fifth and eighth circuit courts of appeals will hear arguments later this year. Who knows what will happen? Meanwhile, in Kansas, the Kansas Supreme Court could rule literally any day now on the constitutionality of that state's ban.

Imani Gandy: Oy vey. There's also a 20 week abortion ban challenge pending in federal court in North Carolina. North Carolina passed a 20 week abortion ban in 1973, decades before the National Right to Life drafted its first model 20 week abortion ban, which was based on junk science that a fetus can feel pain at 20 weeks. And since Nebraska passed that bill in 2011, 19 more states have passed 20 week bans that are tied to fetal pain.

Jess Pieklo: Hold on. I want to walk through this a little bit. Okay. So North Carolina's 20 week ban isn't tied to fetal pain?

Imani Gandy: Right.

Jess Pieklo: And what do you mean by "tied to fetal pain" anyway?

Imani Gandy: Okay. So Nebraska passed the 20 week ban back in 2011. It was the first to pass the National Right to Life's model bill, which they called the "Pain Capable Unborn Child Protection Act."

Jess Pieklo: That bill name is ridiculous.

Imani Gandy: It really is, but anti-choicers are really good when it comes to picking inflammatory bill names. Right? It's what they did in *Gonzales v. Carhart* when they turned the medical name of an abortion procedure, "intact dilation and extraction" into "partial birth abortion," to essentially make that particular procedure sound like infanticide.

Jess Pieklo: And they're doing the same thing with this so-called dismemberment abortions.

Imani Gandy: Exactly. You just mentioned some of the D and E ban litigation, and that's what dismemberment abortions are, dilation and extraction. So basically, what anti-choicers are trying to do is to pull a *Gonzales v. Carhart* with the D and E bans by calling them dismemberment abortions. So can we make *Carhart* a verb? Can we say that they're Carharting D and E bans?

Jess Pieklo: But what about *Stenberg v. Carhart*? Would that be Carharting?

Imani Gandy: I don't know. I see your point. But when people say, "Carhart," I always think of *Gonzales v. Carhart*, not *Stenberg v. Carhart*, but your point is well taken.

Jess Pieklo: Another example of how lawyers are the worst.

Imani Gandy: The worst. Boom! Lawyered.

Jess Pieklo: Boom! Lawyered. Okay. So what's up with this 20 week ban litigation in North Carolina?

Imani Gandy: Right. So North Carolina's ban has nothing to do with fetal pain. It has nothing to do with the so-called "Pain Capable Unborn Child Protection Act". And you know, for years I have wondered and often pestered you about this, Jess, because you're a court whisperer and a sage, about ... I mean, you are. You really are. I don't think you give yourself enough credit. But I've wondered why it is that no one was suing over these clearly unconstitutional bans.

Jess Pieklo: Why are they clearly unconstitutional though?

Imani Gandy: Well, because like we talked about earlier, states can't ban pre-viability abortions, and viability doesn't attach until around 24 weeks. Although, right now in the North Carolina litigation, they basically conceded, both sides have conceded that, that number is 22. But 22 is still more than 20. So what the hell? But I've literally been frustrated for years about the lack of litigation over these bans. But if I'm going to put on my lawyer thinking cap for a minute, it makes sense that North Carolina would be the first test case in this litigation. Right? Because the issues are so simple, North Carolina bans abortion at 20 weeks. *Roe* says, "You can't ban pre-viability abortions." Fetuses are not viable at 20 weeks, therefore North Carolina's ban is unconstitutional.

Now had the Center for Reproductive Rights, and these are the folks that are litigating North Carolina's 20 week ban, had they filed a lawsuit challenging one of the bans tied to fetal pain, a relatively simple case would become a battle of experts at trial.

Jess Pieklo: What do you mean by that?

Imani Gandy: Well, if the basis for banning abortion at 20 weeks is fetal pain, then the state that ties their ban to fetal pain would have to submit evidence that fetuses can feel pain at 20 weeks. And plaintiffs, people challenging that ban, would have to submit evidence that fetuses can't feel pain at 20 weeks. And experts on both sides would disagree and the court would have to figure out which experts are credible, and which experts aren't. And that's a real pain in the ass, and I imagine that plaintiffs would rather have a simple case without having to delve into the science of fetal pain.

Jess Pieklo: I imagine that you're right on that, but they might have to if Congress passes and Trump eventually signs a federal 20 week ban, which is, shockingly, also known as the Pain Capable Unborn Child Protection Act.

Imani Gandy: Ugh.

Jess Pieklo: I know. It's terrible. This bill is so bad. I mean, first of all it says that a fetus feels pain no later than 20 weeks, so obviously setting up the stage for it to be earlier than that.

Imani Gandy: Right.

Jess Pieklo: There's a provision that would only allow folks who have a pregnancy by rape to be able to fit in the rape exception if they have reported their rape or go through mandatory pregnancy counseling. These people are monsters.

Imani Gandy: That's terrible. First of all, I mean especially in the midst of the #MeToo movement that we're having right now and this conversation about rape culture. The idea that you're going to force a person that is raped to go report it and go through pregnancy counseling before they can even be eligible for an abortion seems wildly cruel and irresponsible.

Jess Pieklo: It's terrible. And I mean, I guess the good news is that it doesn't look like there's the votes to actually pass this legislation. It's got to clear that 60 vote hurdle and even though it looks like a few Democrats are going to join with the Republicans. Thanks a lot, folks. But it looks like for now that's not going to pass. The bad news is, well, I think the rest is all really the bad news.

Imani Gandy: The bad news is everything else.

Jess Pieklo: Except for when we hear from listeners. That's the best. And so after the break we're going to read your reviews.

Imani Gandy: I don't think we have any, though.

Jess Pieklo: We don't have reviews. Okay.

Imani Gandy: Hang on. Let me check. Okay, listeners. We love you. You love us. What's the deal with no reviews? You're breaking our hearts.

Jess Pieklo: I'm so sad.

Imani Gandy: I'm so sad. I'm going to cry. We're not really crying, but we really do enjoy hearing from you and we enjoy reading the reviews out loud. So open up that laptop and slap on some reviews, five star reviews. Get into it. Come on, people. Don't let us down.

Jess Pieklo: And while you're at it, don't forget. You can join our Facebook group too, where we keep the conversation going.

Imani Gandy: Yes. Boom! Lawyered Facebook group. Get in it. Get on it. Get under it, maybe. I don't know what that means.

Jess Pieklo: I think it's a Rihanna song.

Imani Gandy: Oh boy.

Jess Pieklo: Boom! Lawyered is created and hosted by Imani Gandy and Jessica Mason Pieklo. The show is produced by Nora Hurley. Our executive producer is Marc Faletti and Rewire's editor in chief is Jodi Jacobson.