

Boom! Lawyered: The Ohio Abortion Ban Saga Is Bananas

- Imani Gandy: Hello, fellow lawyers. Welcome to another episode of Boom! Lawyered, a Rewire.News podcast hosted by the legal journalism team that wishes you a very, very happy Thanksgiving, and hopes you don't spend most of it arguing with your drunk, racist uncle. I'm Imani Gandy.
- Jess Pieklo: And 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, a big thank you to our subscribers, and welcome to any of our new listeners.
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- Jess Pieklo: You can support us at rewire.news/donation.
- Imani Gandy: That's rewire.news/donation. This episode, we're going to be talking about Ohio, and lawmakers' efforts in Ohio to try to pass a law that would effectively ban abortion across the board in the state. It's called a Heartbeat Ban, and it is really, really insidious.
- Jess Pieklo: It is. It's terrible, and what's also terrible is that Ohio isn't the only state to try this. Today we're gonna give you some of the background on these radical anti-choice bills, and explain the strategy conservatives are using to try to get the federal courts to bite. And if they did, uphold a bill that would effectively overturn Roe without, you know, actually overturning Roe.
- Jess Pieklo: Okay, so let's talk about this Ohio bill. It would ban abortion as soon as a fetal heart tone, or a quote/unquote "heartbeat" can be detected, which is usually around six weeks. Now, let me put that in some context for you. Around six weeks, as tagged on this bill, is basically about being two weeks late with your period. So, you know, basically once you've found out that you're pregnant ... Well, you would be timed out of being able to get an abortion in this bill. And to make it even worse, there aren't any exceptions.
- Imani Gandy: Oh, that's lovely. So, effectively it's a total abortion ban, without actually coming out and saying, "Hey, I'm a total abortion ban." And that's what makes it so dangerous.
- Jess Pieklo: Right. And so right now, the good news is, is it hasn't totally passed. It's cleared the Ohio House, and it's likely that it's gonna pass the Senate, but it hasn't yet. So, there's points of pressure there. Governor Kasich has said he's going to veto that. But, you know, I think personally that's some political posturing here, because we all know that he's got eyes for 2020. And I don't know if it matters, because if it passes the House and it passes the Senate, there's likely votes to

override his veto. And if it stalls out, and they want to bring it up again? Well, incoming governor DeWine has said that he's totally cool with this bill and is excited to sign it, so bring it.

Imani Gandy: None of this is new for Ohio. The fight over the heartbeat ban began back in 2011, when long-time anti-abortion activist and general pain in the ass, Janet Porter, who heads up a anti-choice advocacy group, if you can even call it that ...

Jess Pieklo: Which, can I just say that Faith to Action actually sounds like a Christian rock group, too?

Imani Gandy: It sounds like Faith No More. Remember that band from the '90s, Faith No More?

Jess Pieklo: Uh, I totally remember Faith No More. Anyway, sorry.

Imani Gandy: Yeah. That was a sidebar. So, she began pressuring Ohio lawmakers back in 2011, on February 14th. That's Valentine's Day, and that's ... You know. What better day to pressure Republicans to pass a heartbeat ban bill, than on the day when hearts are the main iconography that will rule the day?

Jess Pieklo: Right.

Imani Gandy: And so what she did was, she sent literally thousands, thousands, of heart-shaped balloons to the Ohio State Legislature, and the balloons read, "Have a heart. Pass the Heartbeat Bill." I mean, if you want to talk about fucking theatrics, Janet Porter is the queen of theatrics.

Jess Pieklo: Yeah.

Imani Gandy: And the theatrics didn't end there. I mean, you would think that heartbeat, save a life, pass the heartbeat bill, or whatever the fuck those balloons said ... That's pretty theatrical. Oh, no. It gets better. She also sent teddy bears. Like, she sent children into the State Legislature holding teddy bears, and those teddy bears ... You know the ones that you press them, and they say something?

Jess Pieklo: Mm-hmm (affirmative).

Imani Gandy: These teddy bears had a recorded heartbeat.

Jess Pieklo: No. No. Now, I have an image of a youth group standing in the mall outside those Build-A-Bear stores?

Imani Gandy: Yeah, yeah. "Have a heart."

Jess Pieklo: Literally just lining kids up to do this, and oh my God. So, yes. Using children with teddy bears is really a great advocacy tool. That's wonderful.

Imani Gandy: And when the bill got to the Senate ... Because apparently there's a rule in the Ohio Senate that doesn't permit balloons? I'm not sure if that rule was passed in response to the balloons that descended upon the House. But for some reason, the Senate does not allow balloons on the Senate floor, so instead of balloons, Janet Porter and her little Faith to Action group sent all of the senators dozens and dozens and dozens of red roses.

Jess Pieklo: Good grief.

Imani Gandy: So, the campaign to pressure Ohio lawmakers to pass this bill was so absurd, at the time, that the president of the Senate ... His name is Tom Niehaus ... wrote an open letter to pro-life supporters, telling them basically, back the fuck off. Like, "Stop it with the nonsense. Stop using kids holding teddy bears with recorded heartbeats to try and pressure us into passing a bill." And this kind of shit lasted for a year or more.

Jess Pieklo: So, yeah. The nonsense is just as ridiculous as Imani described, but it's also really dangerous and cynical. Because at the same time that the balloons and the teddy bears and the roses were happening, Ohio lawmakers were also advancing another anti-abortion measure. This one was a 20-week ban. And so, between the six-week ban and the 20-week ban, the anti-choice community was split in some ways.

Jess Pieklo: Guys like James Bopp, who you might know from such notorious cases as Citizens United. He's the gentleman who helped give us corporations are people, and get unlimited dollars for speech. He's also a big anti-choice lawyer, and he was involved in this Ohio fight. He came out opposed to the six-week ban, but in favor of the 20-week ban, because ... And this, in hindsight, with the Kavanaugh court, is so precious. He was worried that, at the time, if the six-week ban passed, it would be subject to a legal challenge. Because, duh. Patently unconstitutional. But, that it would give the Supreme Court a chance to reaffirm abortion rights, but with a stronger language. With, like, an equal protection argument. Which, oh my God. If only.

Imani Gandy: Yeah, wouldn't that have been nice?

Jess Pieklo: If only. And then meanwhile, Janet Porter and her teddy bears, she was super pissed, and was accusing folks like the National Right to Life Committee of being soft on abortion challenges, which is ... You know. I mean, that's the level of absurdity. But I mean, if that sounds kind of familiar, it is because it is. We're seeing that happen right now in Ohio again, except this time with the six-week ban, and this nonsense, total criminal abortion ban that's been in the news recently, that really isn't going anywhere, but is absolutely the same strategy.

Imani Gandy: But we have to remember, back in 2016, this bill made it out of the Ohio State Legislature, only to be vetoed by Kasich. The difference now is that there are probably enough votes to override that veto, so he may not veto it anyway. And

before we start being, "Oh, but John Kasich is such a nice guy. He vetoed the bill." No, no, no, no, no. He vetoed the bill because by vetoing the six-week ban, it would make the 20-week ban look more reasonable. Like, "No, no, no. Hey, guys. Look, guys. Guys, we're not gonna ban abortion at six weeks. That's a little ridiculous. But what about banning it at 20 weeks? I mean, who really needs an abortion at 20 weeks?" Irrespective of the fact that 20-week bans are as unconstitutional as six-week bans. Because the test isn't a number of weeks, the test is fetal viability, and fetuses aren't viable until about 24 weeks.

- Imani Gandy: So either way, the ban's unconstitutional. But six weeks sounds bad. 20 weeks sounds better. So, the 20-week ban passed.
- Jess Pieklo: Yeah. So here we are, with Ohio pulling the same sort of shenanigans. And, you know, using one extreme anti-choice bill to wedge against another extreme anti-choice bill, to create some sense of reasonableness, when it's all absolute bullshit. But like we said at the opening, Ohio isn't the only state to try and pull this, so after the break, we're gonna come back and tell you about other efforts in other states, to pass other unconstitutional abortion bans.
- Imani Gandy: As Jess said, Ohio isn't the only state trying to pull these anti-abortion shenanigans. In 2013, both Arkansas and North Dakota passed some kind of version of a Heartbeat Ban. Both of those laws were challenged in federal court, and they were ultimately blocked. But they weren't blocked without the Eighth Circuit ... Ever the conservative, and ever hoping for a Supreme Court that will essentially undercut or outright reverse Roe ... The Eighth Circuit complained that it couldn't uphold it, because the Supreme Court wouldn't overturn Roe. And, "Waaa, won't the Supreme Court please overturn Roe, because babies in fertilized eggs are people? Blah blah blah." It's ridiculous.
- Imani Gandy: You can tell there's no love lost between me and the Eighth Circuit Court of Appeals, but really, reading their decisions, where they begrudgingly uphold the reproductive rights and reproductive autonomy of pregnant people, simply because the Supreme Court won't let them not uphold those rights, is really irritating. And that was all four years ago.
- Jess Pieklo: Yeah, four years ago the Circuit Court of Appeals was saying, "Please give us a reason to overturn Roe." And you know, during these arguments I always get this image of the judges up at the podium, and the attorneys arguing. But I've actually been in the Eighth Circuit Court of Appeals for arguments, and it is as imposing as that real quick image that I described. It is literally, like, "Here are old men looking down disapprovingly at you the entire time."
- Jess Pieklo: It wasn't just, though, that they complained they couldn't overturn Roe. There were some of the most bananas arguments. Like, I can't even characterize them as legal arguments. But some of the arguments that the lawyers were making in defense of these bills ... I'll just give you a couple of examples. One of the arguments is that because all states have Safe Haven laws, where you can surrender your newborn without questions or prosecution, that we don't need

legal abortion anyway. Safe Haven laws weren't necessarily all in existence in states before Roe. And so, the argument here that conservatives are making are like, "Hey, in any state in the country, you can surrender a newborn, and you won't get prosecuted for it. So, pfft. No need for abortion, anyway."

Jess Pieklo: Another argument they made, and this one is amazing in so many ways, is that because a fertilized egg has the ability to ... I'm using air quotes here ... "survive" in a petri dish ... Which was language that they used ... for a couple days before it's implanted during IVF, the court should take this opportunity just to say that life begins at conception.

Imani Gandy: Why not just say that life begins when a man looks lovingly into a woman's eyes, and begins to feel a little rumbling in his nether regions? I mean, it's like, what is happening? It's absolutely preposterous. But those laws were blocked, and the Supreme Court didn't take up the challenges, so those laws are still blocked, and that's a good thing. And if Ohio's law passes, it should also be blocked. But of course now, we have a newly Trumpified Sixth Circuit, that is ultra-conservative ... Well, not ultra-conservative, but leaning ultra-conservative.

Jess Pieklo: It's gonna get there.

Imani Gandy: It's not as conservative as ... But it's gonna get there. And the Sixth Circuit might very well let the law stand just to be a pain in the ass, and to see if they can bait the quote/unquote "Kavanaugh Court," or the McBeer Court, into taking it. And that's a really cynical way of trying to undercut reproductive rights. You know, pass a bunch of laws you know are unconstitutional, and just keep hoping they make it to the court, until the court makeup changes and is in your favor. Which may just work, in this instance.

Jess Pieklo: That can't really be the plan here, though. Really?

Imani Gandy: I mean, if you really want to know, you can listen to the sponsor of the bill. Her name is Christina Hagan, and she was talking about it on the local news earlier this month.

Christina Hagan: I am not concerned if it ends up in the courts. That's exactly why we've crafted it. Our intention is to go directly at the heart of Roe v. Wade, and to challenge the question of when a life begins in the United States, and when their Constitutional protection is due to them.

Imani Gandy: So, yeah. That is exactly the plan.

Jess Pieklo: That really is their plan.

Imani Gandy: That's pretty much their plan.

Jess Pieklo: I mean, it's amazing, that they're so emboldened that they actually say the quiet parts out loud these days. Like, that's really sort of where we're at. And you know, I think it's important to take those statements, and what's happening in Ohio, and put it in some context here. Because with neighboring states like Kentucky also passing unconstitutional pre-viability bans, I think it's important to take what's happening in Ohio and broaden our view a little bit, too.

Jess Pieklo: Last week, Kentucky had a trial on its D&E ban. This is a law that would effectively ban abortion at 15 weeks.

Imani Gandy: Now, wait. But Jess, can you explain what D&E is, for those listeners who don't know?

Jess Pieklo: Oh, yeah. Absolutely. D&E is the most common form of second trimester abortion, and was the reason why in *Gonzales v. Carhart* ... The decision that upheld the quote/unquote "partial birth abortion ban," that banned a variant of this procedure ... the court said that that ban was allowed to stand, and that was because this most common, safest form of second trimester abortion was still around. And so, naturally, conservatives are trying to ban it.

Jess Pieklo: So, Kentucky had a trial over this that lasted over a week. And Kentucky, remember, only has one clinic. and in that trial, one of the arguments that lawyers for the Bevin administration made was that even if the law cuts off access to abortion before viability entirely, that in this case, it's all right. Because if people need an abortion past 15 weeks, they can just travel to a neighboring state. Well, Imani, you know what state neighbors Kentucky?

Imani Gandy: I'm gonna go with Ohio?

Jess Pieklo: Ohio. Right.

Imani Gandy: Ohio.

Jess Pieklo: Right?

Imani Gandy: So we have a situation where Kentucky, there's a federal court in Kentucky that's arguing that patients can, instead of getting abortions in Kentucky, can go to nearby states to get abortions. But that state is Ohio, which is banning abortions at six weeks, so essentially there's gonna be no abortion access in the entire region. I mean, is that what we're looking at? We're looking at a period of time where there are clusters of states, where you can't get abortions at all? Because that's just ... That's not how it's supposed to be, under the Constitution. Is it?

Jess Pieklo: It's not how it's supposed to be. And conservatives have floated this, "Go travel somewhere else," argument before. They did it in Mississippi in the admitting privileges case, when those laws, had they been allowed to take effect, would

have closed the only clinic in that state, and they said, "You can just go somewhere else." And the Fifth Circuit was like, "Ugh, not totally. That's not how it works." Again, the Fifth Circuit was even reluctant on that. So what I would say is, what we're seeing play out in Ohio and its neighboring states is the anti-abortion movement taking its cues from anti-abortion judges in the federal courts, and using that to set the stage for the next level of restrictions and legal challenges. These are absolutely calculated.

Imani Gandy: And so, while it is depressing that these sorts of bans are being shuffled through state legislatures, it is heartening to know that there are some judges out there who are not about this bullshit. One such judge is Carlton Reeves in Mississippi, and hoo boy, did he issue a barn burner of a ruling yesterday, overturning Mississippi's D&E ban, its 15-week abortion ban, which is the sort of ban that Jessica just told you is on trial in Kentucky. He did not have nice things to say about quote/unquote "pro-life groups" and their attempts to essentially bait courts into overturning Roe. He explicitly said he recognized that that's what they were doing, and essentially said, "Go fuck yourselves."

Jess Pieklo: He did, and he said it in such an amazing way. I covered the decision at Rewire.News, and I linked to the opinion. I highly recommend following that link, and going down to footnote 22. There, he accuses the Mississippi legislature of gaslighting everyone when passing these laws.

Imani Gandy: Yes.

Jess Pieklo: And, I don't know. I want to do Alexa search. This might be the first time I've seen gaslighting show up in a judicial opinion. I'm actually kind of curious about that. But then he also just takes them, rakes them over the coals, and talks about these kind of laws being part of an old Mississippi, versus a new Mississippi. And really, I just ... It's good, good holiday reading.

Imani Gandy: It, really. The short opinion. It'll make you feel a lot better about the state of the world.

Jess Pieklo: So, yeah. What we're seeing play out in Ohio is a familiar strategy. Put two anti-choice bills up against each other ... Both extreme, both unconstitutional ... But somehow use that as a way to argue one, in this case the six-week ban, is not as bad as the other, the total criminal abortion ban that would subject providers to the death penalty, possibly. And you know what? I mean, by comparison ... Like, yeah. But it's ridiculous, it's garbage, it's unconstitutional. And at least we have judges like Judge Reeves in Mississippi doing the right thing.

Jess Pieklo: And so, when folks in Ohio and Kentucky are pushing bills that they say are specifically designed to force a challenge to Roe v. Wade, and they're not even shy about it ... Right now, our hope is that we have more judges like Reeves, who understand the importance the rule of law, and precedent, and also, just what comprehensive reproductive access means to people for full autonomy.

Imani Gandy: That's gonna be our Thanksgiving show today. If you want to continue talking to us about any of these things, you should follow me on Twitter. I'm at angryblacklady. You can follow Jessica at hegemommy, H-E-G-E-M-O-M-M-Y. You can follow Rewire.News at rewire_news, and you should join our Facebook group. And have a happy Thanksgiving.

Jess Pieklo: See you on the tubes.

Imani Gandy: And we will see you on the tubes.

Speaker 5: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. Our producer is Nora Hurley. This episode was produced by Marc Faletti, who is also our executive producer. The Rewire.News Editor-in-Chief is Jodi Jacobson.