

[Boom! Lawyered: Arkansas Is Trying to Invent the 'Abortion Deadline'](#)

- Imani Gandy: Hello fellow law nerds. Welcome to another episode of Boom, Lawyered, a Rewire.News podcast hosted by the legal journalism team that is seriously spirit fingers and jazz hands about the impeachment hearings that are going on today. Sandlin was singing like a songbird. I'm Imani Gandy-
- Jessica Pieklo: And I'm Jess Piekio. 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 thanks to our subscribers and a welcome to our new listeners.
- Imani Gandy: In this episode, we're going to talk about the crushing ennui that I feel, since it's become apparent to me that words have no meaning anymore.
- Jessica Pieklo: What? Wait, what? We're doing, what?
- Imani Gandy: I don't know, Jess, I just feel like we do these episodes, you know, and we're two very smart people explaining complex legal concepts to our listeners who are also very intelligent people, but maybe just didn't go to law school and they want to understand how the law works.
- Jessica Pieklo: Yeah. Okay.
- Imani Gandy: And so, we carry on for however many episodes we've been carrying on for, talking about the constitutionality of abortion restrictions and how pre-viability abortion bans are not constitutional. And then some dipshit state comes along and decides that it's abortion ban isn't really a ban. Oh no, it's not a ban. It's a deadline.
- Jessica Pieklo: Excuse me? A deadline, like for a homework assignment. A deadline? Wait. Okay. How can an abortion ban be an abortion deadline?
- Imani Gandy: I have no fucking clue. I mean, how can an abortion ban just be a regulation?
- Jessica Pieklo: Beats me. I don't know. That sounds like the makings of a good joke, right? A ban, a deadline, and a regulation all walk into a bar.
- Imani Gandy: And then they say, ouch. I just really can't. I mean the bottom line is, I just can't and I have to scream. And so I'm going to do that and-
- Jessica Pieklo: Silently please, silently.
- Imani Gandy: Yeah, silently. Ahh.
- Jessica Pieklo: While Imani is silently screaming, I'm going to tell you what we're going to talk about in this episode. We're going to talk about a couple of particularly absurd

arguments that States like Arkansas are making, in the hopes that one of their pre-viability abortion bans will stick.

Imani Gandy: We're also going to talk about how some of these states seem to have collective amnesia when it comes to basic principles of abortion rights jurisprudence like, for example, pre-viability abortion bans are unconstitutional.

Jessica Pieklo: Unconstitutional!

Imani Gandy: Yeah. Just wildly, patently, shockingly unconstitutional.

So, two weeks ago, Arkansas filed a brief with the Eighth Circuit Court of Appeals, asking that court to allow two of the states pre-viability abortion bans to take effect and boy howdy, the arguments the attorneys for Arkansas are making are downright absurd.

Jessica Pieklo: One of the arguments they're making is that there's no categorical right to a pre-viability abortion and courts are just making it up, just deciding to make it up. So, let's start with that one before we get to Arkansas' it's not really a ban, it's a deadline argument.

Imani Gandy: All right. Sounds like a good plan. I'm going to start by saying yes, huh, there is to a categorical right to a pre-viability abortion.

Jessica Pieklo: Precisely. This is well established law and arguments to the contrary are bad faith and ridiculous, but we should give our listeners some background on the case we're talking about here first. The case is called Little Rock Family Planning Services versus Rutledge, and involves a challenge to two Arkansas laws. The first is the Arkansas 18 week ban, and that bans abortion at 18 weeks gestation.

Imani Gandy: The second is a reason ban, which bans abortion if the physician knows that the reason for the abortion is a diagnosis of down syndrome.

Jessica Pieklo: Now the district court blocked the two laws because they are pre-viability abortion bans and pre-viability abortion bans are what? Unconstitutional.

Imani Gandy: Unconstitutional!

Jessica Pieklo: They're unconstitutional under Roe and Casey, but Arkansas is claiming that the district court conjured a new unqualified right to pre-viability abortion, Imani, just conjured it.

Imani Gandy: Yeah.

Jessica Pieklo: They're are a bunch of witches.

Imani Gandy: No, I don't want to, I can't. I refuse. I just, no. In their brief, attorneys for Arkansas say quote, "the district court committed reversible legal error by declaring a novel absolute right to pre-viability abortion. This led it to completely bypass the undue burden analysis when considering Arkansas's gestational age deadline and genetic discrimination ban." So, there are two issues here. The first is the claim that courts have plucked out of thin air, the right to a pre-viability abortion. The second is this notion that pre-viability abortion bans are subject to the undue burden analysis set forth in Casey. So, let's talk about that first one. Let's talk about this claim that courts have plucked out of thin air, this right to a pre-viability abortion.

Jessica Pieklo: Yes. Let's fucking talk about this one, okay. I'm sweaty.

Imani Gandy: I am too, me too.

Jessica Pieklo: I'm agitated. Can you tell? There's nothing, nothing novel about the absolute right to pre-viability abortion. The district court didn't conjure this new right, they're not a bunch of witches. This has been established law since Roe.

Imani Gandy: Right. So, the Supreme Court in Roe and Casey and myriad federal courts have ruled, that a pregnant person has a right to an abortion until the fetus reaches viability. This is a hard and fast rule.

Jessica Pieklo: And under Roe, fetal viability is a critical benchmark, legally speaking. It's the point at which a fetus can survive outside the womb. Up until that point, a state can't outright ban abortion. It just can't.

Imani Gandy: Nope.

Jessica Pieklo: However, it can interfere, as lawmakers have done, by passing regulations, many of them onerous and intended to make it more difficult for people to access abortion care. They can do that. They can't ban it.

Imani Gandy: Right, now after fetal viability, that's when states can get involved in people's pregnancies, right? They can interfere and force pregnant people to carry an unwanted pregnancy to term with one caveat.

Jessica Pieklo: That state laws banning abortion must, they must, contain a health exception.

Imani Gandy: And the court in Casey reiterated the holding in Roe and said that quote, "the woman's right to terminate her pregnancy before viability is the most central principle of Roe v. Wade. It is a rule of law, and a component of liberty we cannot renounce." So that's, that, right?

Jessica Pieklo: That's that.

Imani Gandy: That's it. We don't need to talk about that anymore. So, let's move on to the second point.

Jessica Pieklo: Okay. So Arkansas is claiming that the district court was required to engage in an undue burden analysis when considering the 18 week ban and the down syndrome ban. Now in Casey, the Supreme Court developed this undue burden analysis and found that an undue burden exists and therefore a particular provision of an abortion restriction is invalid, if the purpose or effect of that law is to place a substantial obstacle in the path of a pregnant person seeking a pre-viability abortion.

Imani Gandy: Now that is worth repeating and so I'm going to repeat it. Pre-viability abortion bans are not subject to the undue burden analysis because by their very nature, pre-viability abortion bans place a substantial obstacle in the path of a pregnant person seeking a pre-viability abortion. This is just common sense, right? A pre-viability abortion ban is necessarily an undue burden.

Jessica Pieklo: Yep.

Imani Gandy: So, let's talk about the two laws specifically, and the truly absurd argument that Arkansas is making to defend them.

Jessica Pieklo: Okay. So Arkansas is really playing semantics here when it comes to whether or not the 18 week ban is a ban.

Imani Gandy: It is a ban.

Jessica Pieklo: No, it's a deadline, right?

Imani Gandy: No. What does that even mean?

Jessica Pieklo: "A ban is a deadline." It's absurd. It means that they're not banning abortion, Imani, they're just imposing a deadline by which you can get an abortion. See the difference?

Imani Gandy: That doesn't make any sense. It doesn't make any sense at all. Imposing a deadline that says quote, " get an abortion before 18 weeks or you can't get one at all," doesn't that ban people from getting abortions prior to that deadline? I mean, I'm pretty good with logic and I feel like that's a logical thing that I just said.

Jessica Pieklo: If it walks like a ban and it talks like a ban, it's a fucking ban.

Imani Gandy: It's a ban.

Jessica Pieklo: It's a ban. What's more infuriating is that Arkansas already tried this. They tried this with their 12 week ban.

Imani Gandy: Yeah.

Jessica Pieklo: That was in a 2015 case called Edwards versus Beck, and in that case, Arkansas defended its then 12 week ban by arguing that the law wasn't really a ban, but instead a regulation. Wasn't a ban, it was a regulation on the time period during which a person could obtain an abortion. The state argued the law didn't ban abortion because it allowed for abortions in all cases, up to the point of both 12 weeks gestational age, and the detection of a fetal heartbeat. Abortions after 12 weeks would be available only in narrow limited circumstances, and that was if the pregnant person's life was at risk, the pregnancy was a result of rape or incest, or in cases of quote, "lethal fetal deformity."

Imani Gandy: Both the lower court and the Eighth Circuit Court of Appeals rejected that argument, as well they should have because it's fucking ridiculous. Imagine if such a regulation or quote unquote, "regulation," were allowed to stand. What's to stop a state from regulating the time period during which a person can get an abortion by say enacting a law that says, abortions may only be performed on Thursdays between 2:35 and 2:45 AM.

Jessica Pieklo: And every other Saturday following the appointment of such and such. I mean, we're basically there, right?

Imani Gandy: Yep. Yep.

Jessica Pieklo: So this new deadline argument is just a refurbished, but it's only a regulation argument. Here's what Arkansas argued in the brief they just filed with the Eighth Circuit. Quote, "Arkansas' gestational age deadline is not an 18 week ban. The deadline responds to evidence linking increased maternal risk to increase gestational age and seeks to limit that risk. It also allows Arkansas to join the many nations limiting abortions after 18 weeks' gestation," end quote.

Imani Gandy: Wait, wait, hold the fuck on. So, now we care about what other countries are doing with respect to their abortion laws. Whatever happened to American exceptionalism? I mean, I thought conservatives love American exceptionalism? They love that shit.

Jessica Pieklo: They do, except that they're hypocrites and bans are really just regulations or suggestions or like-

Imani Gandy: Deadlines. Soft prompts to do a thing. Soft prompts. Oh God.

Jessica Pieklo: But really, they're hypocrites.

Imani Gandy: Yeah. I mean essentially, that's exactly right. They are hypocrites. So, let's talk about this reason ban now. Arkansas passed the ban prohibiting abortion on the basis of a down syndrome diagnosis, right. Now, Arkansas is claiming that they have a compelling interest in banning discrimination against disabled quote,

"children." A fetus is not a child. I just feel like I need to reiterate that, but, they're claiming they have a compelling interest in banning discrimination against disabled, quote unquote, "children," and in trying to remedy a history of discrimination against disabled people. That's great. That all may be true, fart noise. Normally I'm the one who jumps in with the fart noise. I was thrown off there by it. The reason for the fart noise is because I can guarantee that Arkansas is not fully funding, say, educational programs for people with disabilities or providing special services, public assistance for people with disabilities. But, oh no, they're super concerned about preventing discrimination against disabled fetuses. Yeah.

Jessica Pieklo: And even if they are, you know what Imani?

Imani Gandy: What?

Jessica Pieklo: They still can't ban abortion before the fetus is viable, no matter the reason! Like, they can't do that.

Imani Gandy: No.

Jessica Pieklo: The court has already determined that states have an interest in potential life. They have, and they've determined that, that interest though can't take priority of the right to an abortion before fetal viability. These are bright lines.

Imani Gandy: But Jess, it's eugenics abortion.

Jessica Pieklo: Oof.

Imani Gandy: It's eugenics, and Arkansas is really worried about eugenics abortion, just like Justice Clarence Thomas is.

Jessica Pieklo: Yeah. Arkansas really laid it on thick in that argument and basically tailored it for Justice Thomas who spent, what was it like 20 pages railing against Margaret Sanger and eugenics abortions in PPINK.

Imani Gandy: PPINK.

Jessica Pieklo: PPINK vs Box. That's an Indiana case. We did an episode that you should all go back and listen to. It's our May 30th episode.

Imani Gandy: We also did an episode on these down syndrome bans when Missouri tried to pass it's down syndrome ban. That episode was on August 29th ,you should definitely go listen to that. We explained in that episode that antis liked to call these bans, quote, "non-discrimination bans," in order to tug at the heartstrings and hopefully distract you from the fact that whatever their reason for passing them, states like Arkansas are passing unconstitutional pre-viability abortion bans.

Jessica Pieklo: Unconstitutional pre viability-

Imani Gandy: Unconstitutional!

Jessica Pieklo: Abortion bans!

Imani Gandy: Abortion bans. Jazz hands.

Jessica Pieklo: It's our first single.

The thing is, it's not just Arkansas making this, "oh my God, courts have newly invented an absolute right to abortion" argument. Ohio is making the same argument as it seeks to have the Sixth Circuit rehear a case striking down it's down syndrome ban, and there are more than a dozen states that have recently filed an Amicus brief that might as well have been a love letter to Justice Thomas.

Imani Gandy: And let's be clear, attorneys are making these arguments knowing full well that they conflict with the established case law. That's why Republicans are working as fast as they can to fill every vacancy on the federal courts with judges who want to overturn Roe.

Jessica Pieklo: Now I have heartburn and I'm sweaty.

Imani Gandy: Heartburn, sweaty, and it's like-

Jessica Pieklo: This is what middle age looks like.

Imani Gandy: Breakfast wine, I feel like breakfast wine is appropriate right now, right? Like a mimosa or something. I feel like-

Jessica Pieklo: Definitely.

Imani Gandy: I feel like we've earned it.

So, that's going to close out our show for today. We've kept it short and sweet because we know you're probably very, very obsessed with the impeachment hearings, as most of America is. But when you have some free time from the impeachment hearings, really think about some of this bullshit that's going on with Arkansas because it is ridiculous. A ban is a ban. A ban is not a deadline, it's not a regulation, it's a ban, and they're unconstitutional if they are pre-viability abortion bans. Boom.

If you want to talk to us about any of this stuff, please do. You can find me on Twitter @AngryBlackLady. You can find interim president of Rewire.News @Hegemommy. And you can follow Rewire.News @Rewire_News. Oh, join our

Facebook group please. I had to reject about 30 people who hadn't answered the question, so please-

Jessica Pieklo: Please answer the question.

Imani Gandy: Please come back. Please answer the question. We'd love to have you, but we need you to answer the question so, Justice Kegstand, Chugs McCaverton, Poopface McBeerhole. All of these names will suffice for Brad, slash Brett Kavanaugh.

Jessica Pieklo: The Facebook group is the one place where nobody will judge you for going out to your balcony and shouting at the top of your lungs, "pre-viability abortion bans are unconstitutional!"

Imani Gandy: Honestly, we should have like a network moment where you just open, everyone at the same time just opens their door and just screams outside into the wilderness. "Pre-viability abortion bans are unconstitutional!"

Jessica Pieklo: Oh, let's do it. All right.

Imani Gandy: We've got to organize that. It'll be like a real life Thunderclap.

Jessica Pieklo: Nice.

Imani Gandy: All right. That's going to be it for us today. Come talk to us, and aside from that, what are we going to do, Jess?

Jessica Pieklo: We'll see you on the tubes, folks.

Imani Gandy: See you on the tubes.

Boom, Lawyered is created and hosted by Jessica Mason Piekio, and Imani Gandy. Marc Faletti is our producer, and Jess is also the Rewire.News interim president and editor in chief.