

## Boom! Lawyered: Everything You Need to Know About the Abortion Rights Fight in 2020

Imani Gandy: Hello, fellow law nerds. Welcome to our end of year episode of Boom! Lawyered. A Rewire.News podcast hosted by the legal journalism team that hopes that you have taken up arms for the upcoming war on Christmas. I'm Imani Gandy.

Jessica 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. A big thanks to our subscribers and a welcome to our new listeners.

Imani Gandy: Well, here we are, Jess. It's the end of the decade. I've lived through the end of four decades and besides the beginning of the aughts, where apparently everyone was convinced that computers were going to rise up and kill us all, this seems like the most momentous beginning to a decade.

Jessica Pieklo: It does feel really momentous but hold on. I'm confused. Who was convinced that computers were going to rise up and kill us all, Imani? What?

Imani Gandy: Y2K. Don't you remember Y2K?

Jessica Pieklo: I do but I'm pretty sure, I mean, it was a while ago but I'm pretty sure Y2K wasn't about a computer uprising.

Imani Gandy: A robot uprising?

Jessica Pieklo: I don't think that was it either, Imani.

Imani Gandy: Eh, tomato tomahto. I've heard it both ways. All I know is that we were both just a year or two away from getting our law degrees and "Gettin Jiggy With It" was really popular at the time. Everybody was just getting jiggy with it.

Jessica Pieklo: Oh my God! So many law school prom dances had "Gettin Jiggy With It" playing. Did you have law school prom? We had law school prom. Oh God.

Imani Gandy: We did.

Jessica Pieklo: All right anyway. We are veering wildly off course, Imani! We better pull it back together.

Imani Gandy: Fair enough, fair enough but the point is with the orange menace in the White House and the rights of so many people on the brink, it seems like this upcoming year is going to be a doozy.

Jessica Pieklo: It is going to be bananas. That might be the only appropriate description for it. Bananas. 2020 is shaping up to be a hell of a year, especially for abortion rights

in the courts. We've already got one Supreme Court challenge and we've got, oh, a half a dozen or so other cases in a holding pattern waiting to see what the Roberts court is going to do with this first big abortion rights case since Whole Woman's Health in 2016.

Imani Gandy: The decade hasn't even started yet and I'm already tired. Can we take a nap?

Jessica Pieklo: Sure. After the podcast, Imani.

Imani Gandy: Fair enough.

So we should probably start with the granddaddy of abortion rights cases and that's a case out of Louisiana called June Medical Services vs. Gee. We've talked about this case a lot on the podcast. It involves a challenge to Louisiana's admitting privileges law.

Jessica Pieklo: The Supreme Court will hear oral arguments in the case on March 4th and a decision is likely to come this summer. The case itself is a big deal because it could decimate abortion access in Louisiana. Let me explain that a little bit. It would make the principle set forth in Whole Woman's Health apply only to Texas. So we would be doing effectively a state by state analysis. It would also allow states to pass their own TRAP laws in the wake of a bad decision in June Medical Services and states could make the case that unlike Texas' law, their law actually does promote the health and safety of pregnant people.

Imani Gandy: The case could also undermine the rights of abortion providers to sue on behalf of their patients. Louisiana filed a Hail Mary petition with the Supreme Court complaining that plaintiffs don't have third party standing. They do, actually.

Jessica Pieklo: They do.

Imani Gandy: We did an entire episode on this very subject just two weeks ago.

Jessica Pieklo: Another reason June Medical Services is a big deal is that there are a whole bunch of other cases stacked up waiting for the Court to first resolve June Medical Services. We have the Texas fetal remains case, that's at the Fifth Circuit and they're waiting to see what the court does in June Medical Services before resolving that fight.

Imani Gandy: That fight involves whether or not providers are required to bury or cremate the fetal remains of a terminated pregnancy and it's a waste of money and it's also particularly cruel when in some cases pregnant people don't want to have to go through that process. It's just utterly pointless.

Jessica Pieklo: Absolutely. There's that case waiting for a resolution then there's also Texas' D&E ban at the Fifth Circuit that's sitting there waiting to see what the court does in June Medical Services.

Imani Gandy: That case involves Texas' dilation and evacuation ban, which is the most common second trimester procedure for abortion. Apparently they're waiting to see what happens in June Medical Services, as well.

Jessica Pieklo: Then there's Utah's 18 week ban and this one is just bonkers.

Imani Gandy: Yeah, I don't even understand why it is that-- I mean, I do understand because the court said they're waiting to figure out whether or not the plaintiffs have standing-- but if they are being criminalized for performing abortions after 18 weeks then of course they have standing so it is unclear to me why it is the court in that case decided to wait for June Medical Services to be resolved before determining whether an 18 week gestational ban, a 18 week pre-viability abortion ban is unconstitutional. But let's just talk about why it is that lower courts are waiting for the Supreme Court's ruling in June Medical Services.

Jessica Pieklo: Sure, because it's kind of a strange thing for the courts to do. Basically the Fifth Circuit wants to see if the Robert's court is going to clarify what kind of analysis courts have to do when they determine if an abortion restriction substantially burdens abortion rights. That was part of the analysis in Whole Woman's Health. The Fifth Circuit and these other courts are saying, "Hey, we're going to see if the Robert's court is about ready to upend that or if they're going to leave it be, in which case then we can decide what happens in these other cases."

Imani Gandy: And in the Utah 18 week ban case, the court actually granted a motion to stay or pause the case pending a ruling on the standing issue in June Medical Services and this is just utterly bizarre to me because that case is a pre-viability abortion ban, which means there's no undue burden analysis. You know, the undue burden analysis that Planned Parenthood versus Casey requires? There's no undue burden analysis necessary because the court has already decided that pre-viability abortion bans are necessarily an undue burden so what is up with that? I don't understand.

Jessica Pieklo: It's so circular, honestly, I have no idea. But the court basically said that there's this question whether providers have standing to actually challenge the ban. And it makes no sense but it means that the lawsuit is on ice until the Supreme Court resolves that standing issue in June Medical Services and like we talked about when we discussed standing in June Medical Services, if the court decides abortion providers don't have standing to sue on behalf of their patients, then this case will probably get dismissed and the 18 week ban would take effect unless we can find a patient to sue and challenge it.

Imani Gandy: That's great because we already talked about how difficult that that's going to be.

Jessica Pieklo: That's super. That's awesome.

Imani Gandy: Yeah, wonderful.

Jessica Pieklo: Yes.

Imani Gandy: Another area that we got our eyes on for 2020 are procedure bans, specifically D&E or dilation and evacuation bans which anti-choicers have decided to call "dismember abortion bans" for maximum shock value. Jess, you mentioned Texas' D&E ban but what others are we looking at in 2020?

Jessica Pieklo: Sure, we've got several. Arkansas has a D&E ban and that is at the Eighth Circuit. Oral arguments in that case happened in December 2018, so a year ago. Then the case was resubmitted this summer in July and now we just wait. The Eighth Circuit could rule literally any day now on that case. Then we have Ohio's D&E ban. The litigation there is stayed or paused, depending on how the Sixth Circuit Court of Appeals rules on another D&E ban, that one out of Kentucky. Literally we've got, "You get a D&E ban, you get a D&E ban," they're all in the appellate courts right now.

Imani Gandy: "Look under your seat, there's a D&E ban." The Kentucky case is in the briefing stages and not yet set for arguments. That means both the Ohio and Kentucky cases won't get rulings until at least the middle of next year.

Jessica Pieklo: I already talked a little bit about the Texas D&E ban at the Fifth Circuit, which is being held up until the Supreme Court decides June Medical Services but basically that means that these cases are all just stacked. They're just lined up and with the exception of Arkansas, we could end up with decisions coming down in Ohio, in Kentucky all of these all right around the same time.

Imani Gandy: This fight over later abortion in the courts is happening while legislatures work to further restrict medication abortion, right?

Jessica Pieklo: Oh, that's such an important point. That is such an important point.

Imani Gandy: If Whole Woman's Health was about squeezing access through health and safety restrictions, sarcastic quotes, then 2020 will be about squeezing access via "fetal life restrictions."

Jessica Pieklo: Oh, yeah, we're seeing it really on both ends. The attacks on later abortion in the courts and the legislative attacks on medication abortions starting now and man, that window is really winnowing. The big issue for 2020, I think, in abortion rights in the court, Imani, those pre-viability abortion bans.

Imani Gandy: Oy vey, which are unconstitutional. Unconstitutional. Pre-viability abortion bans are so unconstitutional. I don't remember the song but it was great. It was like a Grammy hit.

Jessica Pieklo: Amazing. Seriously. We have so many to talk about. Oh God.

Imani Gandy: We actually just got some really amazing news on this front. The Senate for Reproductive Rights won its case challenging Mississippi's 15 week pre-viability abortion ban so hooray, right? That is fantastic, of course, but it's just one case in the pipeline. There are so many so you know, maybe don't get too excited, just get like 25% excited. You know, like five jazz hand fingers instead of the normal 10.

Jessica Pieklo: Arkansas, man, Arkansas has so much shit going on with it.

Imani Gandy: Yeah.

Jessica Pieklo: Arkansas has an 18 week ban sitting before the Eighth Circuit Court of Appeals. That case is still in the briefing stage, which means oral arguments won't happen until spring at the earliest.

Imani Gandy: Now one of the ways this issue is going to play out in 2020 is going to be states' efforts to re-categorize their pre-viability abortion bans and call them "deadlines" or "regulations."

Jessica Pieklo: Word salad. It's word salad.

Imani Gandy: It's word salad. We've talked about this before. Arkansas has already tried this twice. Once with their 12 week ban back in 2015 they claimed that the ban on abortions after 12 weeks was really a regulation on the time period during which a person could get an abortion. Now they're trying it again before the Eighth Circuit, calling their 18 week ban a deadline. It's not a ban, it's just a deadline. You just have to get your abortion before this particular deadline. "We're not banning it, we're just putting some restrictions on the time period." It's absurd.

Jessica Pieklo: It's an earnest suggestion. I mean, we can make fun of it because it's so ridiculous but I mean, it's serious, too. The reason states are making these arguments is because they're trying to craft a ruling around this bright line rule that says states can't ban abortion before viability. They're really trying to crack that nut. So far the courts haven't bit and we hope that it stays that way in 2020, right, but we've got all those Trump appointees-

Imani Gandy: Yeah.

Jessica Pieklo: Okay so the thing is those aren't the only pre-viability abortion bans we're watching in 2020, either. We just talked about several and they're not the only ones. we didn't even get to all those super extreme abortion bans that were all the rage in 2019. Imani, what's happening with those?

Imani Gandy: We've got Mississippi's six week ban which is also at the Fifth Circuit Court of Appeals. That's in the early stages and could maybe bleed into 2021 with the decision but the court will certainly hear oral arguments in that case in 2020.

Jessica Pieklo: I feel like we need to have a party in New Orleans, where the Fifth Circuit Court of Appeals is located, since it has all these pre-viability abortion bans. Or like, maybe set up an information booth that just says, "pre-viability abortion bans are unconstitutional."

Imani Gandy: "Pre-viability abortion bans are unconstitutional."

Jessica Pieklo: They're all there. They're just all there.

Imani Gandy: They really are.

Jessica Pieklo: I'm sorry.

Imani Gandy: You've got Missouri. Missouri's eight week ban is set for oral arguments in St. Louis in April so we're going to get a decision at the end of 2020 and perhaps the beginning of 2021 in that case.

Jessica Pieklo: Mm-hmm (affirmative).

Imani Gandy: We've also got Alabama's total abortion ban which remains blocked.

Jessica Pieklo: Oh yeah, who could forget that?

Imani Gandy: Actually attorneys for the state said recently that they wouldn't be appealing the order blocking that law, so that's good news.

Jessica Pieklo: Hoo, spirit fingers.

Imani Gandy: But it's qualified good news so maybe just like, put those spirit fingers up at half mast.

Jessica Pieklo: They get five. You don't get 10. You get five.

Imani Gandy: Right you get five spirit fingers, exactly. The order blocking Alabama's ban is temporary so that order will stay in place while the challenge on the merits of the law proceed. Attorneys for Alabama have said that they want to develop in the Trial Court a record of the state's interest in banning abortion before viability.

Jessica Pieklo: This is a really big deal. We should talk about this for a second.

Imani Gandy: Yeah.

Jessica Pieklo: In fact the question of if a state can or how a state is allowed to defend these patently unconstitutional, completely unconstitutional-

Imani Gandy: Wildly unconstitutional.

Jessica Pieklo: Bonkers-ly, is that a word? I made it up?

Imani Gandy: Make it up. Neologism's awesome. Let's do it.

Jessica Pieklo: But how states are allowed to defend these bans in court could be the big abortion fight of 2020. In the fight over Georgia's near total abortion ban, which also remains blocked, attorneys for the state are trying to dump a bunch of junk science on the court and argue that the medical consensus has changed enough on when life begins that the court should just reopen the question of whether states can ban abortion before viability. "You know, just take another look!"

Imani Gandy: You know, it's no big deal.

Jessica Pieklo: Yeah.

Imani Gandy: Thankfully the district court in that case has smacked that nonsense down.

Jessica Pieklo: Yep.

Imani Gandy: The fact is, anti-choice advocates are getting even more aggressive in their attacks on Roe and now they're armed with more junk science than ever. I mean, they have spent the last decade or two developing entire institutes dedicated to propagating junk science and then peer reviewing each other's junk science to give it that veneer of credibility. Just enough credibility for a court to say, "I don't know, is it science? Is it not science? Who knows? The tie goes to the junk scientists." I mean, that's what courts are going to do.

All it takes is one Trump judge to green light this garbage.

Jessica Pieklo: Just one.

Imani Gandy: You know, there are so many bad Trump judges, so many ABA-unqualified, incompetent Trump judges that it is almost a guarantee that some asshole somewhere is going to green light this garbage and I just can't. I can't even at all. My ability to "can" is gone.

Jessica Pieklo: I mean, understandably and that's enough, don't you think? I mean, we're done. There can't possibly be more that we're going to talk about.

Imani Gandy: Oh, there's more. There's always more.

Jessica Pieklo: No. I thought we were done.

Imani Gandy: No, we've got reason bans, Jess. We've got these reason bans.

Jessica Pieklo: Yes.

Imani Gandy: In an effort to further reduce access to abortion, states have really leaned hard into these reason bans, which prohibit abortion if the provider knows that the sole reason for the abortion is on the basis of the sex, race or disability status of the fetus. Now, Down Syndrome bans specifically have become a flash point this year. Anti-choicers have been wielding disabled people as weapons in their war on abortion. They've been claiming that individual people choosing to terminate individual pregnancies on the basis of a downs diagnosis have been engaged in the practice of eugenics.

Jessica Pieklo: What?

Imani Gandy: That's just not what eugenics is. Eugenics is a policy, it's a state-wide, government-wide ideology. It's not individual people making individual decisions about their goddamn individual pregnancies. "I'm going to go engage in some eugenics today."

Jessica Pieklo: Yeah, that's not how it works.

Imani Gandy: "I'm feeling a little eugenic-y today."

Jessica Pieklo: Oh so let's talk about some of these bans. We've got Arkansas', again, Arkansas man, you're killing us.

Imani Gandy: What is up with you, Arkansas. Get a grip.

Jessica Pieklo: I'm going to see you folks in February. Be nice.

Imani Gandy: I got no bones to pick with the people in Arkansas. I got bones to pick with the legislature in Arkansas.

Jessica Pieklo: Bonkers. Okay, so Arkansas passed a Down Syndrome reason ban and that is blocked but the case is currently sitting at the Eighth Circuit Court of Appeals.

Imani Gandy: So Ohio passed the Down Syndrome reason ban that was blocked by the district court. Ohio appealed to the Sixth Circuit Court of Appeals, which upheld the block because it should have. Then Ohio was all like, "Wah, wah, wah, we want another hearing." So they filed for a rehearing en banc, meaning they wanted to have the entire Sixth Circuit hear the case rather than just a three judge panel. Last week the Sixth Circuit agreed to hear the case for some goddamn reason so I would guess it's because the court has become super Trump-ified but whatever. In any event that's on deck for 2020.

Jessica Pieklo: Kentucky passed a sex, race, and Down Syndrome reason ban also. That's currently blocked by district court. Kentucky filed a motion for summary judgment, meaning that Kentucky is trying to resolve the litigation without a trial and we could get a ruling on that case in 2020 also.

Imani Gandy: Jess, there's even more.

Jessica Pieklo: What? No.

Imani Gandy: There's even more, yeah.

Jessica Pieklo: I object.

Imani Gandy: I object. This whole court is out of order. We would be remiss if we did not discuss the Trump administration's domestic gag rule.

Jessica Pieklo: Oh yeah, we really got to talk about this.

Imani Gandy: This rule bars federal planning dollars from being distributed to health care providers that perform abortions or provider referrals for abortion services. There are five lawsuits pending regarding the domestic gag rule. In California, in Oregon, in Washington, in Maryland and in Maine. Everyone filed preliminary injunctions. Some of them were successful, some of them weren't. Those that were successful have their injunctions stayed or paused so essentially the domestic gag rule went into effect while the issue is still being litigated.

Jessica Pieklo: This is just chaos litigation.

Imani Gandy: It is. It is and you know what, chaos is a ladder, Jess.

Jessica Pieklo: Chaos is a ladder. Except that it's not taking us up anywhere good in this case.

Imani Gandy: It's really not. It's just taking us down into Hell.

Jessica Pieklo: It's so bad.

Imani Gandy: I attended oral arguments in the Ninth Circuit in one of the lawsuits, it's the one that was brought by 23 states and repro organizations including Planned Parenthood and the ACLU. I got to sit there and watch the government downplay the effects that the gag rule will have on the availability of reproductive health services.

Jessica Pieklo: Oh, I bet that was lovely.

Imani Gandy: Yeah it was fantastic. Attorneys for the administration actually argued that the gag rule wasn't a big deal because of the 90 Title X grantees, only 18 have left the program and that's only 20% so what's the big fucking deal?

Jessica Pieklo: 20% is a lot.

Imani Gandy: Yeah, yeah.

Jessica Pieklo: 20% is a lot. Wasn't the fallout from the gag rule ongoing while the Ninth Circuit heard these arguments? Wasn't it live and in action at the time?

Imani Gandy: Yes, it was and that's exactly what Ruth Harlow, who's the head of the ACLU Repro Freedom Project pointed out. She noted that what had already happened was bad enough. She said 500 Title X service sites are no longer in operation.

Jessica Pieklo: Jeez.

Imani Gandy: She said that Title X funding had ended completely or had funding gaps in 28 states.

Jessica Pieklo: 28.

Imani Gandy: 28 states and she also said that Planned Parenthood Title X grantees and their sub-recipients had bailed from the Title X program and that Planned Parenthood sites that served almost 40% of Title X patients no longer served that population.

Jessica Pieklo: I'm going to go out on a limb here and say that that is the exact opposite of "no big deal." That's a lot. Over half the states.

Imani Gandy: Yeah. That is a lot. That is absolutely a lot.

Jessica Pieklo: 40% of Title X patients are no longer served? What?

Imani Gandy: Yeah, yeah. We're still waiting for a ruling from the Ninth Circuit and so the California, Oregon and Washington cases are stayed or paused pending that ruling from the Ninth Circuit. Washington has a hearing in February 2020 about its litigation. Maryland has a hearing in January 2020 about Maryland's litigation. Maine is chugging along doing its own thing and they are-

Jessica Pieklo: Maine, that's like-

Imani Gandy: Always Maine. Where did Maine come from? You know what I mean? I love Maine, I've been to Maine, I have friends from Maine but like, Maine? It was just an odd choice for a Title X plaintiff. I don't know why I think that but I just do. I feel like Maine is just all about lobster. Anyway, Maine is chugging along. There are dispositive motions that are expected. Dispositive meaning motions like motions for summary judgment that will resolve the case without trial. And Oregon and California are just in a holding pattern until the Ninth Circuit rules but dates for trial and dates for dispositive motions will be scheduled in 2020.

Jessica Pieklo: We're still fighting over the Title X gag rule in 2020 is what you're saying?

Imani Gandy: Yeah it is a live fight. What does this all mean for 2020, Jess? Just lay it on me.

Jessica Pieklo: Oh yeah, it's my job?

Imani Gandy: Yeah, just tell me what's going to happen because I can't.

Jessica Pieklo: So the TLDR on 2020-

Imani Gandy: Exactly.

Jessica Pieklo: Well, in 2020 we are guaranteed at least one Supreme Court decision on abortion rights, June Medical Services. That's already a big deal. We'll also see the battle lines over these fetal life restrictions crystallize when we get these D&E ban rulings in, right? The court will give some guidance perhaps on how far states can go in banning abortion based on advancing their interest in promotion fetal life. And by the end of next year we'll probably have a good idea which, if any, of these pre-viability abortion bans are getting teed up for SCOTUS.

Imani Gandy: So basically 2020 is a big fucking deal for abortion rights.

Jessica Pieklo: It's the BFD of abortion rights.

Imani Gandy: Yeah.

Jessica Pieklo: It really is.

Imani Gandy: We are going to be tearing our hair out for like the next 12 months and that's going to be fun for us.

Jessica Pieklo: But we're on it, folks. We're on it.

Imani Gandy: I mean, we're on it. We're happy to be on it and we're going to be on it and we're going to be drinking through it and it's going to be fantastic and we might lose our minds but at least we have each other. That's going to close out our end of year episode.

Jessica Pieklo: Oh my gosh!

Imani Gandy: We're so happy that we've ended another year with this podcast. We're so happy that all of you have joined us on this journey. We hope you will continue to follow us in the next year because it's really-

Jessica Pieklo: Please.

Imani Gandy: Shit is getting real, you know? Like Bad Boys 2, shit is getting real.

Jessica Pieklo: I went to the Real World but Bad Boys Two works well, too.

Imani Gandy: If you want to talk to us about any of this upcoming stuff in 2020 or if you'd like to talk to us about anything at all, including Outlander fan fiction-

Jessica Pieklo: I was just going to say we are done talking about Outlander fanfic for the moment. No we're not, I'm totally kidding. It's hysterical. People are snitch tagging me on Twitter in Outlander fanfic stories.

Imani Gandy: I'm really trying to marshal all 1.3 thousand members of our Facebook group to just shame you into watching Outlander. But in any event, if you want to talk to us about this stuff you can follow me @angryblacklady on Twitter. You can follow Jess @Hegemommy, H-E-G-E-M-O-M-M-Y.

Jessica Pieklo: You went all Christina Aguilera at the end.

Imani Gandy: You got to do the hand motions, you know? You can also follow Rewire.News @rewire\_news and you should join our Facebook group because while we may be off for the last two weeks, we'll still be hanging out in the Facebook group, "Boom! Lawyered." Check it out, answer the questions. The answer to one of the questions is, "Justice Kegstand." That's really all you need to know. We'll let you right in. We'd love to have you. On that note, what are we going to do, Jess?

Jessica Pieklo: We're going to see you on the tubes, folks.

Imani Gandy: We're going to see you on the tubes, folks.

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