

## Boom! Lawyered 210: Emergency Pod on Muslim Ban and CPC Decisions

Imani Gandy: Hello fellow law nerds, welcome to another special episode of Boom Lawyered, a Rewire.News podcast hosted by the legal journalism team that really wishes that the United States Supreme Court would just “be best”. I'm Imani Gandy.

Jess Pieklo: And I'm Jess Pieklo. Rewire.News is dedicated to bringing you the best reproductive rights and social just news, commentary and analysis on the web. And the #TeamLegal podcast is part of that mission, so a big thank you to our subscribers and a welcome to our new listeners.

For our new listeners, congratulations, you're coming in on an emergency podcast on one of the worst days of the Supreme Court term we've seen in quite some time. So, welcome.

Imani Gandy: It's terrible. It's so terrible. I mean, I was just waiting, it was about three minutes before seven AM my time and I'm thinking, "This is the last three minutes in life where, ostensibly, it's not okay to lie to pregnant people and it's not okay to exclude people from this country based solely on their religion. But Jessica, here we are.

Jess Pieklo: Yeah. So real quick, let's tell our listeners what happened. So, like we said, today was a terrible day at the court, right? We got two really bad decisions. The first, in *NIFLA v. Becerra*, which is the crisis pregnancy center or fake clinics case, and we're gonna talk about that, that was a five to four decision where the court struck down some pretty reasonable California notice requirements on those clinics.

And then the other is the travel ban. And that's another five to four decision. This time, Justice Roberts wrote the majority. I have thoughts on that. And it said effectively that yeah, the president can decide to just ban folks from Muslim countries and call it a day.

Imani Gandy: So really, what first comes to mind is, "Whither Merrick Garland? Wherefore art thou, Merrick Garland?" Because, say what you will about Merrick Garland being more of a centrist than a die hard Sotomayor social justice warrior Justice, but we all know that had Merrick Garland been confirmed to the Supreme Court, we would not be in this position. Because of instead of Merrick Garland, we have Neil Gorsuch, is that his name? Gorsuch.

Jess Pieklo: Gorsuckish, Gorsuckalot...

Imani Gandy: Gor-sir-sucks-a-lot?

Jess Pieklo: Yeah, we do. I mean, the Senate Republicans, we've talked a lot about Trump and his terrible judicial nominees, but really, this is a bane on the Senate

Republicans entirely. They have completely stolen democracy with these seat, if i may be so bold.

Imani Gandy: Yeah, they actually have.

Jess Pieklo: Okay. So we're gonna have another episode that really talks about the supreme court in its entirety and what I will call the Gorsuch Effect of Garland's seat. So we'll save some of that for another time.

Why don't we talk about the disaster that the court unleashed today, specifically with these two cases, Imani. Let's start with *NIFLA v Becerra*.

Imani Gandy: So, *NIFLA v. Becerra*, that's the case involving the California Fact Act which essentially requires crisis pregnancy centers to A, post notices that there are publicly funded planning services available for low income women, and two, if clinics are unlicensed, to post a notice saying that, "Hey, we're not licensed, we're not actual doctors." The Supreme Court, in a very close five to four decision, written by Justice Thomas, of all people, struck down both of those notice requirements.

And I have to say that the main takeaway for me, the main bit of hypocrisy that really sticks in my craw is that it is okay for anti-choice republicans or politicians to require that doctors provide certain information to pregnant people who are seeking abortion, information that we know is not true, for example, that abortion causes breast cancer, but it is not okay for us to require anti-choicers who are posing as healthcare centers to inform the pregnant people that are coming to them for healthcare services, that they are not doctors, and to inform these people that if they should want a full panoply of family planning services, they can call this number if they are a low income person and get these services publicly funded.

How does that -- those two points don't square well with me because it seems to me that anti-choicers wanted to have their cake and eat it too.

Jess Pieklo: Well, and Justice Thomas and the majority gave them the opportunity to. So, a licensed crisis pregnancy center and an unlicensed crisis pregnancy center had challenged these requirements, and they lost both at the district court level and the Ninth Circuit Court of Appeals. And they lost really hard. And in part, because the Court had set that it is well within the state's power to regulate professional conduct, right? We have all sorts of professional regulations that we have. Lawyers have certain things that we can or cannot say to our clients, for example, and those are typically held constitutional.

But what happened here, is the Court offers us a very cynical take on the First Amendment that shows us that, really, Imani, abortion is its own special category of speech and conduct. And so you're right, normally we have a whole host of laws like of mandatory disclosures around ultrasounds, for example. The court goes out of its way to say, those requirements, when the state is

mandating speech in the context of abortion, those are still gonna be okay because that's actually about regulating the conduct. But, here, it's different. This is about regulating a viewpoint on abortion. And Justice Breyer, in my opinion, really takes them to task for this, don't you think?

Imani Gandy:

Yeah. I mean, Justice Breyer, I feel like we haven't been giving enough love to Justice Breyer. We've been writing these love songs and love letters to Justice Sotomayor, but Justice Breyer who is well known as being the sort of nerd on the Court, really breaks down the ways in which Justice Thomas's opinion makes literally no sense.

For example, he really drills down into *Planned Parenthood v. Casey*, which is the case where the supreme court said, the supreme court rejected a first amendment challenge to some of these informed consent requirements. And one of the kinds of informed consent requirements requires doctors to tell pregnant people that their, "unborn child is a whole human life that was a human life at conception," which, that's a culture issue that people on both sides have been arguing about for decades, but that is not science. That is not medical procedure.

And so, to require doctors to give that information, but then to somehow argue that requiring doctors or fake doctors to tell people that they're not actually doctors is an affront to the First Amendment, or, as Kennedy put it, is "akin to a relentless authoritarian regime," is mind boggling to me.

Jess Pieklo:

Yeah. Let's talk about Kennedy for a moment here, because he writes a concurring opinion that is really terrible in my opinion. It's not terrible just because I don't agree with the outcome, but it's terrible because it's showing what I'm seeing now is a trend towards the end of the term, and this is this concern that the state is being very mean to religious conservatives. We saw it in *Masterpiece Cakeshop*, we saw it when the court kicked back down *Arlene's Flowers* earlier this week, and now we're seeing it here in this concurring opinion where Kennedy didn't have to write this, right? A concurring opinion is just, "Hey, me too, and I have a couple of other things to say." And his other thing to say is that the state was picking on folks who don't like abortion by choosing to make them disclose that they are not licensed facilities.

So, we've got this line of thought that is developing from Kennedy that says, when the government takes steps to enforce neutral principles against evangelicals, that suggests they're being bullies. And this is terrifying.

Imani Gandy:

It's terrifying and it's also utterly useless, you know what I mean? There was no reason for Kennedy to write that opinion. There is no way on God's green earth that you can compare requiring doctors to notify their pregnant patient that they are not licensed doctors, especially when those fake doctors are showing up in clinics wearing lab coats and stethoscopes and holding clipboards and pretending to be healthcare providers. Somehow, requiring the disclosure that

they're not actually healthcare providers is "authoritarian"? Really, Kennedy, really? It's disturbing.

Jess Pieklo:

So, to wrap it up, the majority opinion, written by Thomas, says that these California disclosures probably violate the First Amendment. That means the case goes back down now. It was decided on a preliminary injunction phase. There'll be some findings. But it's hard, given the opinion that Thomas and the majority wrote, to see a lower court coming to a different conclusion here. And so what that means is the Fact Act requirements are probably struck.

I'm guessing that's going to give a green light for conservatives to try and push similar types of lawsuits in other places and make similar speech type claims when they feel targeted by the government for doing things like lying to patients or trying to, I don't know, tell kids that if they just get beaten enough, they'll no longer be gay.

Imani Gandy:

Right. And I hope the upshot of this is that, California's a pretty progressive state, the legislature is pretty progressive, and I really hope that they just go back to the drawing board. I mean, they have been given some very clear delineations about what they can and cannot do in terms of this new weaponization of the First Amendment that the Supreme Court is losing its mind over. So hopefully, California will go back to the drawing board and create an even narrower statute that will still allow pregnant people, low income pregnant people, to access the healthcare services that they need.

Jess Pieklo:

Right, and so, just two final points before we pivot to the Muslim Ban that I wanna make sure we're clear about. There had been some fingers crossed that maybe a bad decision in NIFLA would be able and create some kind of pathway to challenge things like ultrasound laws or, "Your abortion will give you breast cancer," type of disclosures. And, I don't know, I think the Court went out of its way to make that not a possibility in its opinion. And so I think that that's bad news.

And the other thing is, I think we're gonna see this opinion be used to site challenges to those states that have tried to ban so called, "conversion therapy practices." I think we're gonna see some of that. Any final take aways from you, Imani?

Imani Gandy:

Thomas is the pits (laughs). I mean, it's really, I continually am dismayed at the way in which Thomas shows no regard for Black people, for low income people, and those two categories often overlap. It's like he is living in his own judicial bubble, completely separated and unmoored from any reality, and I find it incredibly frustrating. So that's my takeaway, Thomas is the pits, and we've gotta love up on Stephen Breyer a little bit more.

Jess Pieklo:

Yeah. And we'll have more in depth coverage of the opinions for you too at Rewire.News. So be sure and check for those.

All right, Imani, this travel ban.

Imani Gandy:

Oh, this travel ban, So, the court today in another 5-4 decision with Gorsuch providing the deciding vote, ruled that Trump's travel ban was perfectly constitutional. Roberts wrote the opinion for the court, and I just wanna start off by saying that one of the good things about this opinion is that the Court finally overturned *Korematsu*. Hooray! Right? *Korematsu* is that case where the court said that it was perfectly fine to shove Japanese Americans into internment camps during World War II.

So, Roberts said, annoyed, clearly annoyed that Justice Sotomayor in her dissent, brought up *Korematsu* to shame Justice Roberts, Justice Roberts says, "Okay fine, *Korematsu* is no longer good law." And apparently he seemed very offended that Sotomayor even brought that up.

But while saying that *Korematsu* is no longer good law, he is essentially writing the next *Korematsu*. So it's a really strange sort of dovetail between what he cerebrally thinks is right and wrong in terms of constitutional matters, but what he is being sort of, I don't know, compelled or impelled to write in order to defend this authoritarian shit ball of a president.

Jess Pieklo:

Yeah. I mean, you mentioned that Gorsuch was the deciding vote and, again, you know, if only it was Justice Garland. But really, you're right. Justice Roberts owns this opinion. So, for background for the listeners, there were a whole bunch of different challenges to the travel ban, and the one that the Supreme Court ended up taking up was initiated in Hawaii and came up through the ninth circuit. And there, there were a couple plaintiffs along with the state individual plaintiffs, along with the state of Hawaii, that challenged the travel ban on two grounds.

One, that it was beyond the president's authority under immigration law, and then two, that it violated the Establishment Clause. So, Roberts writing for the majority said, "Nope, the president is totally within his authority in terms of immigration law to issue this kind of order, and it probably doesn't violate the Establishment Clause because it never said, 'Muslim'."

Imani Gandy:

But, okay, can we talk about for a minute, how frequently Trump was on Twitter and at rallies and in the news basically saying, "This is a Muslim ban," talking about, "We need to ban these people from the country. It's dangerous. People need to uphold this ban." But somehow, all of those statements and those reactions didn't make it into Roberts' opinion, didn't factory very heavily into Roberts' opinion. Why do you think that is?

Jess Pieklo:

It's an excellent question. I mean, one, I think that they came to the conclusion that they wanted to come to and so, as Breyer and Kagan, they issue a separate dissent and Justice Sotomayor has her own dissent, and all of them are amazing and there's an interesting division of labor that happens in that, Breyer and

Kagan say there's all of this evidence of animus, you just didn't wanna see it. And then Soto goes really all in on that and says, "And here's the legacy of refusing to see that."

So one, I think they just didn't want to. This is more of Roberts' post racial garbage, right? This is like *Shelby County v. Holder* in this idea that, "No, we've moved beyond that." And even though the president is out there on Twitter saying, "Ban Muslims," and even though he's out there on the campaign trail and the very first action he does a week after his inauguration is to issue the first executive order, that's still not enough evidence.

Now, if there's good news in this, it's that this is another case that was decided on a preliminary injunction phase, so that is early in the proceedings. Today's decision kicks it back down to the lower court, and it does leave open the possibility that the courts can look at those statements. Trump's only said more racist shit the longer he's been in office. So, it could be that a second time around, it will be going back through the same circuits, they're not gonna like this outcome nor the reasoning any more. I am holding out hope that on the second time up through, we'll get basically the same decision from the lower court and the Ninth Circuit. But there's a lot there.

Imani Gandy:

Yeah, there's a lot there. And I think what's really interesting, and I wanna talk a little bit about this, is Justice Sotomayor and how fed up she is with all of this. I mean, talk about a woman on the edge, a woman who has fucking had it. She's not putting up with this, and she's shown this throughout the term, right? I mean, she showed this in the *Masterpiece Cakeshop* dissent, she showed this in her *Utah v. Strieff* dissent. She showed this in a fourth amendment case that I literally just wrote about last week and can't remember because I have ADD.

But, it's just, she has shown herself to be someone who is willing to stand up to the sort of authoritarianism that is sweeping across the conservative wing of the court. And I think that, I know that we've written and recorded love songs for Justice Sotomayor, but she really is one of the justices to keep an eye on in terms of protecting the constitutional and civil rights of marginalized people in this country, in this case particularly, Muslims.

Jess Pieklo:

Listeners and readers sometimes ask how do we read the tea leaves in terms of telling that Sotomayor is done, and one of the things that I point to is, it's tradition. I mean, we talk about the justices and the courts and the legal profession, generally, we try to be really cordial to one another and have, agree to disagree and very professional and polite ways. And so, the craft of writing has developed ways to do that. And one of those standards and one of those tools is when you issue a dissent, you often say, "I respectfully dissent." And Sotomayor is done showing the majority any respect here. This is her second opinion or her second dissenting opinion this week. The Texas racial gerrymandering--

Imani Gandy:

That's the one that I forgot about.

Jess Pieklo: So, but in her dissent, it was, "I dissent." She is done. And I think that that, if we're having conversations about civility and all of that in popular media right now, I think that we're getting a clear right there that you don't actually have to be civil to fascists.

Imani Gandy: Yeah. And there's really no point in being civil to fascists. And just by way of contrast, in Breyer's dissent, going back to the *NIFLA* case, Breyer says, "I respectfully dissent." Now, Breyer is always very professorial and so he explains, I mean, his dissent in that case is very, very much so sort of like a law school exam. But, the fact that he respectfully dissented and the fact that Sotomayor just straight up dissented like nothing else, really shows you how important these issues are to Justice Sotomayor and how fed up she is with the conservative wing of the Court not recognizing the ways in which this regime, this Trump regime, is further marginalizing already marginalized people, targeting them for animus or racial animus, for mob violence, and ultimately tossing babies in jail and doing all sorts of other really on the road to Fascism things that should alarm all of us. And I feel like not enough of us are alarmed.

Jess Pieklo: Can I just read the last sentence or two of her dissent? Because it's powerful and it's profound and when we're talking about the gravity of the decisions that the Court has before us and the willingness that the conservatives are to just toss aside facts to come to a political conclusion, I hope it's something that gets taught, and I'm anticipating it will, in law schools, "Our constitution demands and our country deserves a judiciary willing to hold the coordinate branches to account when they defy our most sacred, legal commitment. Because the court's decision today has failed in that respect, with profound regret I dissent." Profound regret.

Imani Gandy: Boom, I mean really, boom. She's been on fire lately. And I'm sort of making it my mission in life to just start reading everything about her, all of her opinions, all of her dissents. I'm gonna go back to her time in the circuit court. Because I feel like she's going to become one of those justices that people are sleeping on now, but in five, ten years, people are gonna look back and be like, "Wow, she might have been the one that helped save this goddamn democracy," because Roberts and Thomas and Gorsuch and Alito, they're just, they've gone rogue. You know what I mean? They've gone rogue and they don't seem to be willing to do what's necessary to check the executive, which is their job, by the way.

Jess Pieklo: It is. And brings us back to the first point we made at the beginning of this podcast, which is, the difference Justice Garland would've made because you know, I kind of think that Justice Sotomayor was on track after her appointment to become Chief Justice, and at least really a standard bearer in terms of the legal jurisprudential traditions. And so, what she's doing now as her role as a chief dissenter is really carving out the judicial resistance to the Trump administration.

Imani Gandy: I like that, the judicial resistance. I really like that. So there we have it, folks. We'd hope that we would have better news--

Jess Pieklo: Can we get a beer now?

Imani Gandy: But we don't have better news. Jess and I are gonna continue drinking our breakfast wine, and we encourage you to do the same thing. Please be sure to follow us on Twitter. Jessica is [@Hegemommy](#), H, E, G, E, M, O, M, M, Y. I am [@AngryBlackLady](#). We will have written pieces that will delve into these issues even further. And if you have any questions, please hit us up on Twitter or join our Facebook group, [Boom! Lawyered](#). It's real easy to find, answer a couple of questions about how much you love us, and then you're in.

Jess Pieklo: Yes, please join, and we will have a wrap up episode on the court coming for you too sometime next week. Then Imani and I are gonna take just a little summer break through July to kind of collect ourselves. Well, you'll still see us on Twitter and publishing pieces. And then we're coming back in August with a bunch of new episodes and looking forward to it. So, please stay tuned and thank you for listening.

Imani Gandy: Thank you so much for listening. Goodbye all.

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.