

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 biting its nails, waiting for what the Supreme Court is going to decide to do in this Louisiana abortion rights case. 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. So, a big thanks to our subscribers, and a welcome to our new listeners.

Imani Gandy: So, in our last episode, we talked about a case called June Medical Services versus Gee. It involves a Louisiana law, an admitting privileges law, that requires abortion providers to maintain hospital admitting privileges at a hospital within 30 miles of where the abortion was performed. So, we talked about the efficacy of that law. We've talked about how unconstitutional it is, and how the Supreme Court really ought to issue a stay of the Fifth Circuit ruling upholding that law in order to maintain the status quo while that law proceeds through litigation. So, on Friday the Supreme Court gave us a stay. We were like, "Woo hoo! We got a stay," and then we read the order and we were like, "Oh no."

Jessica Pieklo: "No."

Imani Gandy: Because the order only extends the stay through this Thursday, through the 7th.

Jessica Pieklo: What?

Imani Gandy: Yeah. So, that's in order to give the court more time to consider arguments, and that, that my friends, my dear listeners, is really, really, really fucking weird.

Jessica Pieklo: It's so weird, and I mean, we need to walk through just how weird it is because you're right. Hooray, we got the stay and in fact, we were kind of skeptical that that would even happen. Instead, we got this issue that was literally Alito saying, "I don't know, give us an extra week," and that's just not what federal courts in the normal course of business do. Okay, generally speaking the court, specifically the Supreme Court, but federal courts generally want to keep, like Imani said, the status quo. They want to do that even as they're considering really big issues and cases that could upend that status quo like this Louisiana case.

Imani Gandy: The Louisiana case could upend the status quo, because it is in direct conflict with Supreme Court precedent, a case called Whole Woman's Health versus Hellerstedt, that the court issued a decision on three years ago in a case that abortion rights activists were ecstatic about, and it reaffirmed this idea that states can't just simply enact these abortion restrictions willy nilly, claim that the purpose of them is to advance patient health and safety, when in reality the purpose of these laws is to close abortion clinics. That is what the purpose of this Louisiana law that we're talking about is. The purpose is to close abortion

clinics. So, the Center for Reproductive Rights filed an emergency petition with the Supreme Court and asked the court to maintain the status quo. In other words, it asked the court to stay or pause the Fifth Circuit's decision to let this Louisiana law, this wildly unconstitutional Louisiana law, ask the court to stay that decision so that the law would not take effect while the Center for Reproductive Rights was litigating this lawsuit, and appealing the Fifth Circuit ruling to the Supreme Court.

Jessica Pieklo: And the court did that, kind of, but only for a few days because we've got this other order looming by the end of this week, and that's what makes this whole situation so weird, Imani. My brain, it's in knots.

Imani Gandy: It hurts. It actually hurts my brain. The institutional norm would have been-

Jessica Pieklo: Remember those?

Imani Gandy: Oh god, I remember those. I don't know, I feel like that was when the court had a lot of legitimacy and maybe wasn't as partisan as it is now. I don't know, call me crazy.

Jessica Pieklo: I don't know.

Imani Gandy: The institutional norm would have been to grant the Center for Reproductive Rights' request, because that would have maintained the status quo. The status quo has been for the past four years that this particular law has not been in effect. Why? Myriad reasons. It closes almost all the clinics except for one, it puts all the burden of 10,000 abortions on one doctor in one state. This is a serious problem. This is what is known in preliminary injunction talk as irreparable harm. So, the court should have just issued the stay and allowed the plaintiffs to file a petition with the Supreme Court, to file a writ of cert, and to ask the court to actually review the case writ large. That's what should have happened. Why didn't that happen, Jess?

Jessica Pieklo: Yeah, fuck if I know. The reality is, even though the posture of this case that we've been talking about, that we really went through in the last episode and now is in an emergency proceeding, right? The Fifth Circuit issued that decision, and the law was set to take effect today on Monday the 4th, absent this temporary pause, but even in normal emergency proceedings the court should have just granted the stay to let the litigation proceed because like you said, there's all these reasons why it was already blocked but in terms to even unpacking the idea of the status quo even further, by not allowing the law to go into effect while this really substantive, constitutional challenge continues, it is also not upending the clinic access map, right?

Imani Gandy: Right.

Jessica Pieklo: Which, what is going to happen? Should this law take effect? So, it's not just that the law stays the same. It's that people's day to day lives stay the same while the courts are fighting that out. So, normally in a world where institutional norms matter, where the federal courts are really fulfilling their duty, they would have granted the stay, allowed the Center for Reproductive Rights to file its petition, and use that time to consider it. That's not what's happening here. Friday's order just hit pause. It stayed that decision for that week and to me, that suggests that the court is considering letting this law take effect regardless of whether or not its gonna eventually take up the Center for Reproductive Rights' appeal or not.

Imani Gandy: That, ladies and gentlemen, is the absolute opposite of maintaining the status quo.

Jessica Pieklo: It really is.

Imani Gandy: Essentially, the Supreme Court is sowing chaos. Sowing chaos when it comes to clinic access in Louisiana. In addition to maybe letting the law take effect, Friday's temporary stay is also trouble because of some of the arguments that Louisiana made regarding injury. So, if you've been following us for a while, you may recall that one of my very first Boom! Lawyered explainers was about preliminary injunctions, and it used a very clever analogy to Ginuwine's Pony, which I still find amusing but essentially, I proposed a hypothetical and tried to explain what happens when preliminary injunctions are sought, what happens when they are granted, what happens when they turn into permanent injunctions. One of the main inquiries when seeking out a preliminary injunction and when a court decides whether or not to grant one, it's to take a look at irreparable harm.

There can be no injunction unless the person seeking the injunction is going to suffer "irreparable injury." So, in their court documents, Louisiana argues that pregnant people in Louisiana aren't going to suffer irreparable injury because hey, at most, this law is going to close one clinic and what's the big deal? People still have the opportunity to go to this clinic. Oh and also, by the way, we just hit up the Louisiana Department of State Health and at the last minute, literally the day before we filed our papers with the Supreme Court, they posted this nonsense notice about how they're not really trying to close clinics. What they're trying to do is to bring clinics up to code with regulations and blah, blah, blah.

Jessica Pieklo: What?

Imani Gandy: Yeah. It was all a bunch of nonsense in order to, basically, ally to the fact that what would have happened today would have closed all of the clinics but one. It would have left pregnant people who were literally scheduled to get abortions today, without a place to go, potentially pushing their pregnancy further along. So far along that they can't get an abortion in Louisiana at all, because no one now does abortions now in Louisiana past 17 weeks. So, these are the real,

concrete harms that pregnant people in Louisiana would have faced starting today if the Supreme Court had not issued this very brief, temporary stay.

Jessica Pieklo: I've got to pause and hold space for the fact that the State of Louisiana is claiming that it's the real victim here. I mean, it's not clinics. It's not patients, it's not providers that will be injured if the Fifth Circuit's totally, wildly unconstitutional and inappropriate decision is allowed to stand, it's the good folks defending the law, the State of Louisiana. I'm sorry, that's just ... I mean-

Imani Gandy: It's absurd, and what they're saying is that Louisiana is being irreparable harmed because the great citizens of Louisiana elected their representatives to enact laws, and to pass legislation, and to uphold those laws, and those great citizens of Louisiana are being injured because the state is being preventing from shutting down every abortion clinic but one.

Jessica Pieklo: I've got to go get a drink. I don't even know what to say to that.

Imani Gandy: Breakfast wine anyone? I mean, it's only 10:15 in the morning but at a certain point, you got to start drinking at 10:00 in the morning, because when you're sitting here listening to a state that wants to close almost every abortion clinic and basically screw over thousands of pregnant people in Louisiana, listening to them claim that they are the real victims here is just more than my brain can handle.

Jessica Pieklo: And to bring it back to this stay, this weird, weird, weird stay that got issued on Friday, the fact that the court didn't just smack that away outright suggests that they might be taking that seriously, Imani.

Imani Gandy: Yeah, yeah. Yeah, I mean, what? Are they just waiting to give RBG, and Elena Kagan, and Sonia Sotomayor their chance to write scathing dissents so they can essentially screw over those people of Louisiana? I mean, that's what it seems like.

Jessica Pieklo: Yeah. I mean, it's hard for me to see Friday's order as long term good news. Long term good news at least would have looked something like, "Yes, we'll grant this stay and go ahead and file your petition, and we'll consider it even if eventually the Roberts Court decides to side with Louisiana," in which I think, I mean, look. We've got a solidly conservative majority, even when Kennedy was on the court before he retired in May, they kicked the Arkansas case back down which we talked about in last week's episode on this case too. So, there are plenty of signals to say that this might not go well, but it's really hard to see Friday's order as something to celebrate, reading the tea leaves as the court giving this consideration that bends to the benefit of abortion rights supporters, right?

Imani Gandy: Right. So essentially, in order to answer the question that's on everybody's mind. What do we think SCOTUS is going to do? What we think SCOTUS is going

to do is essentially permit this law to go forward. They're giving the liberal justices a chance to write their dissents, and we're just living in a brave, new, really fucked up world where now that the court is conservative, everything that we've come to know about abortion rights is up for grabs. It's going to be upended and yet again, here we are, buzzkill Jess and buzzkill Imani trying to help you get through all of this shit. We're sorry, we have to be such buzzkills, but we're truth tellers. We've got to tell you the truth, and we're telling you the truth so you can figure out what to do with it and maybe just go agitate and get mad. If you live in Louisiana, go get angry at somebody. I mean, don't get violent, but maybe go protest. Make a sign, go to the capitol, and just make yourself ... sorry, because this is unconstitutional. This is bullshit, and this is not fair to pregnant people in Louisiana.

Jessica Pieklo: So, the Supreme Court said that it was going to administratively stay the Fifth Circuit's decision through Thursday. So, that means that we're going to get another order and it could be, like Imani said, one that refuses to extend that stay to the decision, which would let the Fifth Circuit's decision take effect. I expect the Center for Reproductive Rights is gonna be filing a petition for cert regardless, so I mean, there's that. If they extend the stay though, I'm gonna be an even bigger buzzkill and say I don't even know if I think that's good news because ultimately, at the end of the day, unless John Roberts really is going to have a change of heart, I don't see this conservative Supreme Court doing anything other than consistently voting against abortion rights. I think that we are going to see it here. So, breakfast wine it is.

Imani Gandy: Breakfast wine for everyone. That's gonna wrap us up for today. If you want to continue talking to us about this, you can follow me on Twitter at @AngryBlackLady. You can follow Jess on Twitter at @Hegemommy, and you can follow Rewire.nNws at @Rewire_News. Thanks for joining us, and we'll see you on the tubes.

Jessica Pieklo: See you on the tubes.

Speaker 3: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. This episode was produced by Marc Faletti, who is also our executive producer, and the Rewire.News editor in chief is Jodi Jacobsen.