

[Boom! Lawyered: Rapid Reaction to 'June Medical Services v. Russo' Arguments](#)

- Imani Gandy: Hello fellow law nerds! Welcome to a special rapid reaction episode of Boom, Lawyered a Rewire.News podcast hosted by the legal journalism team that is in a studio gazing into each other's eyes from across a table. I'm Imani Gandy.
- Jessica Pieklo: And I'm Jess Pieklo. Hello.
- Imani Gandy: Jess, we're here in studio in Washington DC, why? What did you do today?
- Jessica Pieklo: Good question, Imani. I was at the Supreme Court for oral arguments in June Medical Services versus Russo.
- Imani Gandy: Wow. I was too, except I was outside while you were inside. What I want to do is give our listeners a sense of what happened inside the courtroom.
- Jessica Pieklo: Sure. Let's give some background for a little bit. Can we talk for just one hot second about the fact that oral arguments in this case were only an hour? You and I have spent, how many hours do you think talking about June Medical Services? Podcasting about it, writing about it, yelling about it on Twitter.
- Imani Gandy: 50?
- Jessica Pieklo: -thousand maybe!
- Imani Gandy: 50,000. I think that might be excessive, but it's a lot!
- Jessica Pieklo: It's a lot. And so we've got this case, an hour for arguments total. We've got attorneys from the Center for Reproductive Rights who were arguing on behalf of abortion providers, and that was Julie Rikelman from the Center for Reproductive Rights. She did a really good job. Then we have the Louisiana solicitor general Elizabeth Merrill, who was arguing on behalf of the state of Louisiana, and she was fine. She was fine. She did what she needed to do and then we had a very special appearance by Jeffrey Wall, principal deputy solicitor general for the Trump administration.
- Imani Gandy: Wait, wait, wait, wait, wait. Why was the Trump administration at oral arguments in a case involving a Louisiana state law?
- Jessica Pieklo: We're going to get into that because I have a lot of thoughts.
- Imani Gandy: Okay. Because that seems a little unusual to me.
- Jessica Pieklo: Yeah, but let's remind listeners what this case is about. It involves Act 620, a Louisiana admitting privileges law and that's a law that requires doctors who perform abortions to have hospital admitting privileges nearby, within 30 miles

of the clinic they perform their abortions. The law is identical. This sounds familiar, to you.

Imani Gandy: Identical, yes.

Jessica Pieklo: To one that was struck down four years ago.

Imani Gandy: And we were here four years, almost to the day, we were here four years ago in Whole Woman's Health versus Hellerstedt where the court ultimately struck down Texas' admitting privileges law, which is again identical.

Jessica Pieklo: Identical.

Imani Gandy: Identical to the one that is now at issue in Louisiana.

Jessica Pieklo: The question that the justices were asked to answer and will ultimately have to answer by the end of the summer when the term is up is whether the Fifth Circuit Court of Appeals got it right when it said that Act 620 could take effect. Just to rewind a little bit, while the fight over the Texas admitting privileges law was happening, Louisiana was having its own fight and in that fight was a district court trial that lasted for many days. Volumes of evidence, it goes up for appeal and the Fifth Circuit says, "We know there was a trial but we really just don't like the outcome and so we are going to let this law take effect." That's the nugget of the question that the justices have to answer. And this really big landmine in the case, which is do abortion providers have the ability, do they have legal standing to bring certain types of claims on behalf of their patients? And so it's a huge case with really big implications for abortion rights and access regardless of how the justices decided.

Imani Gandy: Let's talk about that thing you just mentioned, standing. That's, we've called that the sleeper issue in the case. We've called that an issue that could upend the ways in which these cases are litigated. It might require, if we get a ruling that providers don't have standing to sue on behalf of their patients, we could end up with lawyers having to go out and find pregnant people to sue on their own behalf. And as we've discussed, nobody really wants to do that when they're pregnant, especially in this era of the demonization of abortion. What did the court have to say about standing? What's your impression of how they're going to rule on standing?

Jessica Pieklo: The court is sharply divided on this question, which I think is no surprise. And it's something that in particular Justice Alito really wanted to talk about. Now, the standing issue is something that just came up independently at the Supreme Court. It wasn't raised in the lower court and it wasn't raised at the Fifth Circuit Court of Appeals. It wasn't even raised the first time that this case was before the Supreme Court when Roberts stepped in and said, "We're going to put that Fifth Circuit a decision on hold while we continue to fight it out." It wasn't until the Center for Reproductive Rights filed their substantive a cert petition, that's

their request to the Supreme Court to take the case, that Louisiana said, "Oh hey, by the way, we don't think providers should take that." That is really unusual and that context is really important.

Imani Gandy: And I think it bears repeating that this case was litigated for five years and for five years, Louisiana conceded that these providers had standing and then they conceded it in the lower court, conceded it in the Fifth Circuit, conceded it the first time they went to the Supreme Court and then at this last minute they decided to throw this hail Mary petition. By the way, just kidding, we don't think they have standing anymore. That in and of itself is quite unusual. But please, how did the court feel? How do you think?

Jessica Pieklo: The hardcore conservatives really want to gut third party standing. In fact, it was the very first question Justice Alito asked Julie Rikelman in her case, and that is insider-y baseball because the Center for Reproductive Rights, the providers, they obviously didn't challenge their own standing. For Alito to ask that of the providers initially, says that this is the issue that he's really focused on and how they talked about it and the way in which the court talked about it was really important too. It's not just that, well, pregnant people should be able to bring their own claims. They can bring their own claims. Nobody's saying that. It's the question of is there a conflict of interest that providers have with patients to bring those claims?

Jessica Pieklo: And that's what Alito was all over. All he wanted to talk about were "money grubbing abortionists who have financial incentives to skirt regulations." And abortion providers are the most heavily regulated industry for most part! There was a lot of bad faith around that. But he really honed in on that. We've talked about John Roberts being the deciding vote on standing and him having a history of being very conservative, thinking that, that many people should have standing to bring claims. He didn't ask a single standing question. And that makes me nervous. I would have liked to have some better sense of where the chief justice's thinking was on this.

Imani Gandy: That could mean that he's just decided we're just going to go with precedent because I'm concerned about my legacy and I'm not going to upend 50 years' worth of standing jurisprudence. Or it could mean that he is so disgusted by standing that he's already just onboard with Alitos' nonsense.

Jessica Pieklo: Yeah, it could be that he's just letting Alito take all the body blows, knowing that people like me and you are going to talk about how just awful he was and letting him do the dirty work and he just is going to ultimately sign onto that. The question of Chief Justice John Roberts and precedent is really interesting because this case we've talked about shouldn't even be here. Her opening remarks to the court, Julie Rikelman said that this is about precedent. This is about whether or not the justices are going to respect their own decision from four years ago.

Jessica Pieklo: And so if Roberts were to decide to split the baby because of some sense of , loyalty to precedent and Whole Woman's Health, or in standing, I don't know, that just seems cynical because what are you going to do? Say that from here on out we're going to have a state by state inquiry in terms of abortion restrictions? But which is effectively upending the precedent of Whole Woman's Health, but like leave standing in place? That's all. I just, I think if the Chief Justice is going to respect precedent, then he needs to both find that abortion providers have standing and that Whole Woman's Health disposes of this case and that Act 620 is unconstitutional.

Imani Gandy: Assuming he doesn't do that.

Jessica Pieklo: Fair.

Imani Gandy: Let's talk a little bit about the specific facts of this Louisiana case. First of all, what arguments did Louisiana make to differentiate the way that this law is applied in Louisiana versus the way that it was applied in Texas, which led to the court striking down the law in Texas as being an undue burden? It seems to me that the burdens are the same. Did the court say anything about, well, the burdens aren't so bad in Louisiana, so really it's not necessarily that we have to follow a Whole Woman's Health to the end of the year earth, but rather Whole Woman's Health set forth these principles that are applicable to Texas and then Louisiana has to make its own case and opponents of the law in Louisiana have to make their own case separately.

Jessica Pieklo: That's Chief Justice, what appears to be Chief Justice Roberts' position in a nutshell, right there. Is that what Whole Woman's Health did was set out a standard that is fact intensive, but that ultimately is a state by state inquiry. That would require courts to examine the benefits of a particular admitting privileges law in that particular state as well as the burdens of its implementation. And so yeah.

Imani Gandy: But then the question becomes in Whole Woman's Health, the court said that these laws have no medical benefit. If the laws have no medical benefit, that seems like a pretty just straightforward statement. What are these benefits going to be in different states?

Jessica Pieklo: Louisiana really tried to find some wiggle room in the record and if the conservatives are amenable to that, then we will get a decision I think that says effectively Whole Woman's Health was great. We love it. However, it only applies to Texas because in that litigation there was evidence developed that this specific law had these specific burdens and provided no material benefit. And list the items in that record. Now Louisiana has that record. Louisiana district court found all of those things and the Fifth Circuit just overturned it. How the justices engaged at the level of good faith, we'll see.

Jessica Pieklo: But to answer the question of what did Louisiana argue? Louisiana basically said, "Hey look, the abortion providers in our state are super sketchy so they need extra, extra regulation. That is evidence that we have that the benefit is different than Texas." Now the Center for Reproductive Rights said, "Nonsense. That's actually not true. And here's all the evidence to rebut that." But, and this is a law nerd point, it just strikes me that we're at the Supreme Court where we're supposed to be arguing principles of law, of broad applicability here. We're not supposed to be arguing details in the record. That is the job of a trial court. And so this is really a case about the appropriate separation of powers between the appellate courts and the lower courts and what the court is going to do with that too.

Imani Gandy: That was going to be my next question. Was there any indication that the justices were irritated with the Fifth Circuit and the way in which the three judge panel just looked at the lower court's findings and said, "We disagree." Because the standard is reversible error, clear error and there's no way that a panel of judges, a panel of appellate judges could look at that district court ruling and find that there was clear error in the rulings that were made, the factual findings that these doctors tried really hard to get privileges and were unable to. The fact that if this law is upheld, there will only be one provider left and that one provider has said he's not going to continue to provide care because of the stigma, because of the death threats. And the Fifth Circuit said, "Whoa, that's speculative." Well, is it? The guy just said what he's going to do. Was there any discussion of the proper role of the appellate court system when it comes to these cases?

Jessica Pieklo: Yeah, Justice Stephen Breyer has had enough of this nonsense. He has better things to do than sit and listen to arguments in substantially the same case four years later with no difference really even in the record. And he in particular really honed in on not just the Fifth Circuit going rogue and basically deciding it was just going to do whatever it wanted to do because it liked a particular political outcome that it could craft in an opinion. But the willingness of the state of Louisiana to just embrace that Fifth Circuit error and run with it was almost offensive personally to Breyer. At one point he even asked the solicitor general from Louisiana to identify specifically in the record, where is your strongest case that the district court got it wrong? Which of the doctors am I supposed to focus in on and say, "Here is where I can say that, You know what? When the Fifth Circuit overturned all of the evidence, they were right to do so."

Jessica Pieklo: And I think it's really important to note that the attorney for Louisiana couldn't answer that question. She just dodged and weaved and was like, "Well this doctor tried to do this and this one." And there was actually this really great moment because she said, "Well and then I'm going to point you to Doe number six," which is the doctors are listed by aliases Does one through six or seven I believe. And we've gone on and on about our love for Justice Sotomayor on this show. And here is another love letter to send up to Justice Sotomayor because she seized on this immediately. Her knowledge of the record was just impeccable from the bench. She's like, "I'm so glad. That's an excellent example.

That's a doctor who only performs medication abortions and so if you are only performing medication abortions, you are not going to be able to get admitting privileges because you need to have a certain number of hospital admissions in a given year in order to be privileged at that hospital."

Imani Gandy: That's amazing.

Jessica Pieklo: And just center to town. And it was one of those moments it's completely inappropriate for the press to be fist pumping during an oral argument. If I had the the opportunity to during that moment, it would have, but you could like hear those of us just kind of be like, yes. Get it.

Imani Gandy: Get them. Get them, yeah, yeah, yeah.

Jessica Pieklo: That again, that's knowing the details from the trial court and then being able to immediately call bullshit to Louisiana. It was a mwah, chef kiss moment for Sonia. I loved it.

Imani Gandy: And also it's absurd that a Supreme Court Justice would have to become that familiar with the record because Fifth Circuit decided to just upend it and ignore it. That's strange and unusual in and of itself.

Jessica Pieklo: Yes, and it goes back to the earlier point about the way in which Alito was arguing off of the record in terms of attacking abortion providers because what Justices Breyer and Sotomayor were able to do in that moment was really pull the curtain back on the ways in which those folks defending these laws were arguing in a bad faith position off the record. They're playing fast and loose with the facts and the justices were not, well, the liberal justices were not having that at any rate.

Imani Gandy: One of the things we talked about in our preview of this case was -- we were talking about what was Breyer going to say. We just discussed that and what was Kagan going to say. Did Kagan have any comments? Did she give any indication that she might be able to drag old Johnny boy by his ear over to the liberal wing when it comes to this case?

Jessica Pieklo: Yeah. Kagan was also -- you got the sense that she was frustrated by the fact that the case was even there and really was honing in on the findings that the Supreme Court itself made in Whole Woman's Health, as to the benefits and burdens of admitting privileges generally. I think that is 100% evidence that she is having a conversation with Roberts there to say, "Look man, we have this rule and I get that you don't like it, but the rule of law matters. It matters. And in this decision we said that there are no medical benefits and if there are no medical benefits then there can be no compelling state interest in admitting privileges law generally. Case closed. Let's go get a burger." That's how it should have gone. I do think she was really focusing a very pragmatic approach in questioning to try and corner Roberts.

Imani Gandy: Yeah. Apparently the Trump administration made an appearance in this oral argument, which odd to say the least. Deputy solicitor general John Wall.

Jessica Pieklo: Jeff Wall. Yep.

Imani Gandy: Jeff Wall. John, Jeff.

Jessica Pieklo: Brad.

Imani Gandy: Brad, Chad.

Jessica Pieklo: Chad. [laughter]

Imani Gandy: Jeff Wall was there. Why exactly?

Jessica Pieklo: This is such an excellent question and let's give some background for the listeners. The Trump administration is not a party to this lawsuit. This is a fight between abortion providers and the state of Louisiana. Nowhere in that equation exists the federal government, except the Trump administration said, "Oh no, actually we have a lot of things to say about state level abortion restrictions and how hunky dory we think they are." The Department of Justice petitioned the Supreme Court for some time during oral arguments and so they took some of the state of Louisiana's time. Julie Rikelman got 30 minutes and the Supreme Court split the time between the state of Louisiana and the Trump administration.

Jessica Pieklo: To answer your question of why are they there? There's no good reason for that. There is absolutely no reason. There's no legal imperative. There's nothing to say that the Trump administration had an interest that it needed to preserve, that the state of Louisiana could not do so on its own accord. What having Jeff Wall there does is send a signal, which is that the Department of Justice is exceedingly interested in abortion rights jurisprudence and litigation. And we are starting to see this. The Trump administration is now going to jump in in the Sixth Circuit case over Ohio's reason ban. That's a law that that bans abortion if the patient says that they are having the procedure based on the race, sex or Down's diagnosis of the fetus.

Imani Gandy: Why?

Jessica Pieklo: Again, why? These aren't questions, these aren't federal questions beyond a federal constitutional right to abortion. And so the Trump administration, the federal government, is going out of its way. It's using its scant resources to say one of our top priorities is whenever possible, arguing for a rollback of federal constitutional rights. And I think just boiling it down to that nugget is really important. Jeff Wall didn't do anything in these oral arguments that the solicitor general from the state of Louisiana couldn't do herself except be a voice of the federal government arguing on behalf of these abortion restrictions. And so

that's something that as we're looking ahead to the state of abortion rights access generally and what it looks like in the courts, should be really very scary. We have the federal government who is going to put its full force of its resources and its personnel and its money to say that patients can't exercise a fundamental constitutional right.

Imani Gandy: And that just seems like it's more of the same when it comes to the Trump administration's relationship with the court. We've seen them time and again just skip the appellate courts and goes crying straight to the Supreme Court demanding relief. And so now they're going crying to the Supreme Court asking for oral argument time in cases that don't involve them. This has been great. Thanks for sitting down with me, Jess.

Jessica Pieklo: It was amazing.

Imani Gandy: And telling me about what it was like in the court today.

Jessica Pieklo: What was it like outside the court? I didn't get to see the rally. Give me a little bit of flavor for what it was like outside.

Imani Gandy: It was great. The pro-choice people showed up in force. There were "loud mouth lawyers" for reproductive justice, like If/When/How. There were -- Center for Reproductive Rights obviously had a huge contingency. The Abortion Access Force had a great sign that just had a picture of a uterus on it and it said, "Literally no one asked you."

Jessica Pieklo: That's amazing.

Imani Gandy: Which I thought was great.

Jessica Pieklo: Good job folks.

Imani Gandy: But yeah. Yeah. It was really great outside there. A lot of people came up to me and said, they really like our podcast, which is lovely.

Jessica Pieklo: Oh thanks everyone.

Imani Gandy: Shout out to people. One person even said that we'd inspired her to go to law school, which I was like, that was the opposite of what we were trying to do.

Jessica Pieklo: Oh no, we failed.

Imani Gandy: But if you're going to law school for repro, that's something that wasn't available to us in our day.

Jessica Pieklo: Yeah, not like this.

Imani Gandy: Shout out to all you law students who are out there just going to law school for reproductive rights. I salute you.

Jessica Pieklo: Me too.

Imani Gandy: And beyond that, if you have any more questions, you want to talk to us about this case, these arguments, you can find me on Twitter @AngryBlackLady. You can find Jess on Twitter @Hegemommy, H-E-G-E-M-O-M-M-Y. This morning I did a Facebook Live segment with our new president, Galina Espinoza so you should look for that. I'll start tweeting it and I'll post it in our Facebook group, which you should also join. Boom, Lawyered Facebook group. Answer the question, some of the questions are a bit outdated. We do need to update them, but Justice Kegstand, Justice, Beerface, Justice Beerpong, all of those names will suffice as aliases for Justice Kavanaugh. Thank you for joining us. And on that note, what are we going to do, Jess?

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

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

Imani Gandy: Boom, Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. Marc Faletti produces the show.