

## [Boom! Lawyered: Rapid Reaction — Supreme Court Protects DREAMers](#)

- Imani Gandy: Hello, fellow law nerds. Welcome to a special reaction episode of Boom! Lawyered, a Rewire.News podcast, hosted by the legal journalism team that is frankly floored. We're just floored. 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 #TeamLegal podcast is part of that mission, so a big thanks to our subscribers and a welcome to our new listeners.
- Imani Gandy: So, Jess ...
- Jessica Pieklo: Yeah.
- Imani Gandy: I feel like maybe we owe Neil Gorsuch a bit of an apology because we spent maybe about a year referring to him as Neil Gorsuck. And as it turns out today, he, well, at least for today, he doesn't suck. He doesn't suck at all. He's actually quite brilliant. And I'm surprised, shocked, befuddled, beside myself, all of those things.
- Jessica Pieklo: I mean, you bring up a really good point, and I got to say, lawyers will go out of their way to avoid being wrong, but I am really happy to be wrong today.
- Imani Gandy: I have never, never been happier to be wrong.
- Jessica Pieklo: I thought, for sure, we were going to fire up the podcast, and it was going to be a moment of eternal scream into the void, recognizing all of the work that lays ahead, but I'm going to go grab a whiskey because we got to celebrate.
- Imani Gandy: A celebratory whiskey. Not one of those, "Oh my God. Everything's terrible. I'm going to pour a vat of whiskey over my head."
- Jessica Pieklo: We should probably tell listeners why we're excited. What happened?
- Imani Gandy: Okay. So today, the Supreme court ruled that it is actually a violation of Title VII of the 1964 Civil Rights Act for an employer to fire an employee because they are gay or trans. What! I mean, what. I honestly, I was floored. I was shocked. This weekend, I spent 48 hours just laying low. I watched Notting Hill last night, cried a little bit about Hugh Grant and Julia Roberts and their beautiful love together. And I thought this is going to be the last good day that I have for a while because SCOTUS is going to shit the bed. And I'm going to have to deal with not only the legal ramifications, but the ramifications of my trans and lesbian and gay and bi friends who would be hurt by a decision that says that they can be fired for being gay or trans. But hey, that didn't happen!

Jessica Pieklo: No. So let's break down what did. It used to be legal in 26 states to fire someone if they were gay or trans. Today, that's no longer the case. Immediately, that is such excellent news. It means that as a baseline level now, federal anti-discrimination laws apply to LGBTQ employees. And that includes folks on this spectrum, right? So can you be hired or fired because of an employer's feelings about your sex? No. The Supreme court today made it very clear that can't happen.

Imani Gandy: And that's not at all what I was expecting, but also very welcome news because I literally tweeted yesterday, "I cannot wrap my mind around the fact that it could be okay for an employer to fire a person simply on the basis of who they are." And I thought, but I guess we're going to find out how SCOTUS decides that's okay tomorrow. And they didn't. They went the opposite direction, so much so that I feel like there may be some sort of, I don't know, underground fight club scenario between Neil Gorsuch and Sam Alito.

Jessica Pieklo: Okay. Yeah. So let's get into this. So let's talk about the opinion, the logistics of the opinion. Okay.

Imani Gandy: Yes. Yes. Let's do that.

Jessica Pieklo: 172 pages. This fucker is long.

Imani Gandy: 172 goddamn pages, 140 of which is Sam Alito and Justice Big Beer fucking screaming and crying about how it should be okay for gay and trans people to be kicked out on the street by their employers. How are you going to write 140 pages disagreeing that it's not okay to fire someone for being gay and trans. Thanks, Sam. You're a real peach.

Jessica Pieklo: I mean, yeah, so this is a really important point. 30 pages of what the court did today was to affirm the rights of LGBTQ employees. In an excellent opinion, we're going to talk about some of the nuggets of it that Neil Gorsuch, he wrote a hell of a really great opinion so much so that John Roberts sided with it, right? The court came out six to three on this. So very top line six to three, you can't fire someone for being gay or trans. So 30 pages, it's clear. This is a simple question. In oral arguments, we heard advocates say Title VII speaks very clearly. We don't have to go through all of these machinations about what employers are or are not thinking because this is discrimination on the basis of sex.

In 30 pages, the majority did away with it. As you said, Imani, in 140 pages, Sam Alito, Justice Kavanaugh, and Justice Thomas go and just get their panties in a wad about the meaning of words. What do words mean? In fact, Justice Alito even included the dictionary as an appendix to his dissent. And I'll just do a little sidebar here that says when I used to teach legal writing, we would tell our students there are some things you don't do like cite the dictionary. Don't cite

the dictionary. Not only the Justice Alito cite the dictionary, he included it as an appendix. That's terrible.

Imani Gandy: It's terrible. And also it's terrible because the dictionary was written by cishet white dudes. That comes up a lot when people are talking about racism. They want to go to Webster's. Well, Webster's defines racism as ... and you know what? I don't give a shit what a dictionary says about anything to do with any marginalized population because the dictionary was written by white dudes. Cishet white dudes.

Jessica Pieklo: Also. The law deals with this stuff, right? So sex is defined in the law. It doesn't matter if Alito is all mad that Merriam-Webster says something different. It's bad faith. And to see the Supreme Court justices leading with such bad faith, I think should be called out.

Imani Gandy: Absolutely. And one of the other things that ... actually, one of the questions that one of our listeners had for us on Twitter was what does this mean about genderqueer and non-binary folks as separate from trans people because it's a separate category of person, right? There are people who are trans and there are people who are gender nonconforming. So what does this opinion have to say about those folks?

Jessica Pieklo: That's an excellent question. On the one hand, it says everything because it says that, very clearly, if you are an employer who is making a decision about somebody's employment status because of their sex, that that violates Title VII, so you can't do that. So it's not just, "I'm firing you because you're gay," but that in the calculus of that decision, sex is the necessary factor. And this is where Gorsuch really drove it home. And this was the argument that advocates made at the court and that he got Roberts to buy into. So that's really great. That's really important. I will say that there are a couple of red flags. One is this idea that Justice Gorsuch raises about RFRA as a super statute, and then the second is this idea that, well, there are other issues like maybe bathrooms or dress codes that this opinion doesn't get to. And so to me, that's concerning because that leaves some area for future fuckery from conservatives.

Imani Gandy: So I want to get back to the point that you made about RFRA. Right. So that argument came while Gorsuch was talking about the concerns that people have about their religious convictions, right? About the idea that religious Christian, white evangelicals are fundamentally opposed to trans people as a concept, right? They're opposed to these people existing. And so doesn't their sincerely held religious belief that trans isn't a "thing", so shouldn't that supersede whatever statutory protections that Title VII offers people. And I think what you and I discussed is that Gorsuch sort of through the RFRA, which is the Religious Freedom Restoration Act, which prohibits a government from substantially burdening the rights of a person who has sincerely held religious beliefs.

So we discussed might have been a bone thrown towards Roberts in order to get him to sign on to this opinion because, as we know, this idea that people

have religious beliefs that can permit them to discriminate, can permit them to not serve cakes to gay people or to not provide wedding invitations, all of that is a very fraught issue and it still is. And so it very easily could have been that the religious folks won on that argument, right? Fine. Trans people are people. Great. We get it. But also we're religious. And we don't believe in them. We think that they're fairies, or we think that they're some sort of mystical creatures who don't really exist, but who just kind of flit about in the outskirts of society. I mean, I think that the court has said that is not enough for you to say, "We're not going to hire you because you're gay or trans."

Jessica Pieklo: Yeah. There's a lot going on there. And so let's talk about this John Roberts moment here because he joined with the court's liberals and Gorsuch to give a six to three decision. And that's significant for a couple of reasons. One, it means this decision isn't five to four. It's much harder to write off this as a purely political decision at six to three than it is five to four, so-

Imani Gandy: Well, especially because you have Gorsuch and Roberts siding with the liberals. We all expected it was going to be 5-4 -- trans rights, no rights -- gay rights, no rights -- but it's not. It's 6-4 with Roberts and Gorsuch signing on with Kagan and Sotomayor and Breyer. So that means something. That's momentous.

Jessica Pieklo: It is momentous. And so the chief justice did two things there. He sided with the majority, but he did not write the opinion. So that kind of removes him out of that also, which I think is really significant, especially because his voting record and where he has weighed in substantively is never in favor of LGBTQ rights. He is very solidly a reliable conservative vote in the other direction. So that begs the question, to use one of your favorite phrases, of how did he get here? What caused him to join with the conservatives here? And that's a very intriguing question. Is it because the opinion tees up the possibility for a future fight for evangelicals to win, which is this RFRA, religious objection fight. And that could be.

We know that the court has a case next term involving some of these issues, right? *City of Philadelphia v. Fulton*. That's a case we've talked about on this podcast before where evangelicals are looking for the ability to refuse certain services to LGBTQ families. That case involves foster care and adoption placements. So that is a future fight. And it could very well be that Gorsuch and the liberals here sort of picked their battles incrementally and said it's more important to live to fight another than to get this nailed down with Roberts entirely.

Imani Gandy: And I think I have to say I was truly impressed by just the verbiage of Gorsuch's opinion.

Jessica Pieklo: Oh, let's talk about that. It's good.

Imani Gandy: So the people who were advocating for permitting employers to fire gay and trans people were using this particular argument that says, "Well, Congress, when it enacted Title VII didn't specifically address gay people, didn't specifically address trans people, and therefore, because later Congress has tried to provide protections based on sexual orientation and ended up not doing so, then that somehow mean that everybody knew that in 1964 that this law couldn't possibly have covered trans people or gay people." Because, A, Congress failed to speak specifically to that case and, B, who would have ever thought of that back in 1964. And the way Gorsuch responds to this is just classic. He says that there is "no such thing as a canon of donut holes." And I feel like that's going to go down with Scalia's "jiggery pokery" and these other sort of very odd phrases, these turns of phrases that they come up with.

But the idea of a canon, meaning a sort of a set of rulings, a set of decisions, of principles, there's no canon of donut holes, meaning just because Congress doesn't specifically mention something, doesn't mean that Congress has created an exception for that thing. So just because Congress didn't say sexual orientation is included in Title VII, doesn't mean that it meant to except sexual orientation and trans rights from Title VII. So I really love that phrase, canon of donut holes.

Jessica Pieklo: Especially because immediately I pictured a weapon firing out donut holes, and not-

Imani Gandy: And now I'm hungry.

Jessica Pieklo: But can I just say one thing here? Let's have a moment of appreciation that this is Justice Antonin Scalia's legacy that is being solidified here because he's the one who was like, "Of course sexual harassment is discrimination on the basis of sex." And that issue wasn't in the statute either, right? Gorsuch really just picked up Scalia's mantle here and carried it to the next logical conclusion, which is why his opinion is only 30 pages long. And conservatives are going to be so mad about that.

Imani Gandy: Oh, so mad. And just to clarify, the reason why it's Scalia's legacy is because there was this case called Oncale Sundowners, where the issue was whether or not sexual harassment against men was contemplated within Title VII. And Scalia's like, basically, "Well, duh," you know what I mean? And so Gorsuch just took that, "well, duh," to its next logical conclusion, which is, of course you can't fucking fire someone for being lesbian, gay or trans because that is necessarily firing because of sex. And the way he went through that particular analysis, I mean, he hit basically every point that advocates arguing in oral argument hit, that we've been hitting for almost over a year now, which is that if you are firing or refusing to hire a gay man, based on who that gay man is attracted to, other men, and because that somehow falls outside "societal expectations" that is necessarily discrimination on the basis of sex.

You can't get around it. And so what employers wanted to do is say, "Well, maybe it might have been one of the reasons we refuse to hire the person or fire the person, but there were other reasons, too." And Gorsuch is like, I don't give a fuck. It doesn't matter if there were also other reasons. The fact is that the person's sexual orientation or trans identity was a "but for" cause of the firing decision or the refusal to hire decision. And that's it, that's all they wrote. You don't need anything else.

Jessica Pieklo: Meanwhile, it was Justice Brett Kavanaugh who basically did a keg stand all over Justice Kennedy's legacy on LGBTQ rights. In his dissent, which was, "Hey, look, Congress has to fix the statute." It's the like most, Oh, I don't know, smarmy milk toast ... almost like he knew he had to write something because all eyes were going to be on him. And it's just gross. So everybody who was like ... yeah, he's gross.

Imani Gandy: He's terrible. Yeah. Yeah. He's definitely surpassed Gorsuch in the realm of terribleness because I'm rather impressed with Gorsuch. 30 pages, extremely buttoned up, hit every single point that Mad Alito and Sad Brett tried to try to nail them on. And it's just like, "Okay, Neil, I will drink a breakfast whiskey in your honor."

Jessica Pieklo: Absolutely. Yeah, no, we're going to tip one out for Neil this morning because he's earned it.

Imani Gandy: So is there anything else that we should cover that we think our listeners might want to talk about? I think one of the things that I found really interesting is that Gorsuch argued that this whole conversation argument, this idea that if you were to ask a trans person why did they get fired, they would say, "Well, I got fired because I was trans," they wouldn't say, "Oh, I got fired because of sex." And since Title VII requires this calculus about "because of sex," then obviously, being fired because of your trans isn't being fired because of sex because that's not what you would say if you were asked in casual conversation. And Gorsuch, just basically said, that's a horseshit argument. We don't base our legal principles and our legal adjudication based on what kind of conversation you might have at a party. I mean, that's just ludicrous.

Jessica Pieklo: No, absolutely. And again, all of the applause to Neil Gorsuch today. He gets it. One point that I do want to raise because I've seen a few questions on Twitter about it, and we haven't really had a chance to talk about it is over on Friday, late Friday afternoon, the Trump administration announced it's a repeal of Section 1557 of the Affordable Care Act. That's the rule that says you can't discriminate on the basis of sex in delivery of healthcare services. And they dropped it on the fourth anniversary of the pulse shootings. Just everything about it is mean spirited. What today's decision does is really take the guts out of what the Trump administration was trying to do in that rule repeal. First of all, how the court interprets Title VII necessarily weighs in on how it interprets other federal civil rights statutes.

And the Affordable Care Act is a federal civil rights statute. So reading because of sex to include sexual orientation and gender identity that transfers to the Affordable Care Act, or at least it should, same with Title IX. So to the extent that the Trump administration was trying to be a bunch of evil mean-spirited bastards on Friday, who knew that on Monday, the Supreme court was going to try to nullify that. That is a little bit of a surprise. So the ACA fight is still live. We will be covering it, but the immediate implications of what happened on Friday, especially for trans folks has been neutralized. And so that's additional good news.

Imani Gandy: And the one final thing that I wanted to say is that there was this discussion about whether or not employers could discriminate against groups of people, right? So they can say, "Well, we're not discriminating against this individual person. We're just discriminating against trans people across the board. And as long as we're treating different groups of trans people equally shitty, then that's not a violation of Title VII." And Gorsuch was just like, come on, man. That doesn't even make any sense because Title VII addresses individual discrimination. It says, in the words, individual, it doesn't talk about discrimination against groups. And therefore, it doesn't matter if you want to treat lesbian A as crappily as lesbian B. The fact of the matter is you're treating both lesbians crappily on the basis of their sex, and that's discrimination because of sex. So let's just stop this nonsense about, "Oh, well, it's okay to discriminate as long as we discriminate against everyone equally." No, it's not an everyone discussion. It's an individual discussion.

Jessica Pieklo: Right? Yeah. Goodness... feels weird.

Imani Gandy: I don't know how I feel about it. I was really expecting to have just this awful terrible day. I woke up and I was like, "my God, this is going to be the pits." And then it was like, "Okay, we can't load the opinion for a half an hour, but I think we won." Apparently, this opinion was so popular, it legitimately took me 25 minutes to download the goddamn thing.

Jessica Pieklo: It crashed the Supreme Court server. It was that momentous. It's a huge day for civil rights. I just-

Imani Gandy: Huge. Huge day for civil rights. Huge day for the LGBT community. I just want to give a big virtual hug to everyone who has been stressed out about this over the last several months. I know our former colleague, Caitlin Burns, last night said to me, "I have no hope." And that's just a heartbreaking thing to hear especially after the Friday news about the healthcare services. This is a good day, and we should hold this day as being good and not think about what may be coming on Thursday.

Jessica Pieklo: Yeah. There are more opinions coming on Thursday. We're just going to end on a good note.

Imani Gandy: We're going to end on a good note.

Jessica Pieklo: And just say it's a good day.

Imani Gandy: It's a good day. Happy pride, everyone. Trans rights or human rights, gay people rule, bisexual people are the business, and hey, we're awesome. Let's do this. Until Thursday. So on that note, we're going to end this episode. We're very thankful to all of you who have donated. Please, if you are inclined to do so, if you love these sort of reaction podcasts, if you love it when you see Jessica take over the Rewire.News Twitter, which she did this morning, you got to give us some money. Not a lot, if you don't have a lot, that's fine. Couple of ducats, whatever pesos you have in your pocket, some shekels, it's all good.

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Jessica Pieklo: We'll see them on the tubes.

Imani Gandy: We're going to see you on the tubes. We're going to be in a good mood, seeing you all over the damn tubes. Have a great one, guys.

Jessica Pieklo: I'm smiling.

Imani Gandy: What is this on my face? It's a smile.

Jessica Pieklo: It's crazy.

Speaker 3: Boom! Lawyered is created and hosted by Jessica Mason Pieklo and Imani Gandy. Marc Faletti produces the show.