

[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 really just doesn't know what the fuck is even going on anymore. What is happening? 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 on Thursday, the Supreme Court decided to protect about 700,000 DREAMERS from deportation when it ruled that the Trump administration's attempt to end the DACA program were, say it with me: arbitrary and capricious. [laughter] So my first question was... Okay, let me give Jess a moment to get the arbitrary and capricious. Breathe in, breathe out. Breathe in. Okay. Jess, what is happening?
- Jessica Pieklo: I don't know! What is going on? This big decision, another one this week that we were frankly, expecting to go the other way.
- Imani Gandy: Yeah, let's get into it. Let's give a little background on what this DACA fight has been about.
- Jessica Pieklo: So we're talking three years, more or less, in the making. California in a coalition of states sued the Trump administration in September 2017, and that was just a couple days after the administration had announced that it was rescinding the DACA program.
- Imani Gandy: So the DACA program is the Deferred Action for Childhood Arrivals immigration program, and it was initiated under the Obama administration. DACA allows some people who were brought into this country unlawfully as children to stay in this country without this constant, Sword of Damocles threat of deportation hanging over their head. Now, of course, Trump and noted 80 year old/30 year old, Stephen Miller-
- Jessica Pieklo: [laughter] Noted 80 year old/30 year old is amazing!
- Imani Gandy: It's true though! What is with that guy? He's like from the shadow realm or something? I don't know. He freaks me out.
- Jessica Pieklo: Hate ages, man. Hate ages.
- Imani Gandy: But Trump and Stephen Miller hate the DACA program and made it one of their very first policy targets. They ordered the Department of Homeland Security, DHS to begin unwinding the program. So, you know what that means.

Jessica Pieklo: That means agency law. We're talking the Administrative Procedure Act-- what the government can and can't do.

Imani Gandy: Yes! So advocates sued saying that the Trump administration could not do what it was trying to do, and that its efforts to rescind the DACA program or end the DACA program were arbitrary and capricious.

Jessica Pieklo: And that, listeners, is super sexy law talk for, "You did this shit just because."

Imani Gandy: Yeah, right. No reason for it. Just go ahead and do that.

Jessica Pieklo: So there's this big fight in the courts about the Trump administration's efforts, and the Trump administration even tried to get the Supreme Court to step in once earlier in this fight, but the court was like, "Nah, we're not ready yet."

Imani Gandy: So what happened on Thursday? What happened today, which is Thursday?

Jessica Pieklo: What?

Imani Gandy: Yeah, I don't know. I thought it was three Thursdays ago. I have no idea what's going on.

Jessica Pieklo: Blursday. They're all blurred.

Imani Gandy: It's Blursday, that's right. [laughter] So what happened? Did the Supreme Court actually just tell the Trump administration to basically fuck off?

Jessica Pieklo: The court did basically, at least for now. So in a five to four decision, the court said that while the Trump administration does have the power to rescind the DACA program, the way it went about it was all screwed up. It was...arbitrary and capricious!

Imani Gandy: So these were the claims in the litigation. First, is that the DACA rescission memo, which is the memo that purported to end the DACA program -- that memo by acting DHS Secretary Elaine Duke violated the due process guarantee and the equal protection guarantees of the Fifth Amendment.

Jessica Pieklo: Advocates also claimed that DHS made its decision without providing notice or the opportunity to comment as required by the Administrative Procedure Act , and that by doing so, denied states the opportunity to provide evidence about the overwhelming success of the program.

Imani Gandy: And third, that the Department of Homeland security further violated the Administrative Procedure Act by failing to give adequate justification for ending the program.

Jessica Pieklo: And finally, advocates said that federal law doesn't allow substantive changes in DHS policy without an analysis of the negative impact of rescinding a program like DACA. So for example, what would the impact be on small businesses, nonprofits, local governments? Trump administration didn't do any of that and they're supposed to.

Imani Gandy: Essentially, the Trump administration just woke up one day and were like, "We don't like DACA anymore," and just ended it, didn't do any of the things that they were supposed to do under the APA, didn't analyze impact, didn't really provide much of a notice and comment period, didn't talk to people. They were just like, "We don't like it. No." No.

Jessica Pieklo: No DACA for you, basically.

Imani Gandy: Exactly.

Jessica Pieklo: And the Court more or less said, "Yeah, that's what they did." They said, "No." In fact, "Trump administration, you have to give folks an opportunity to participate in the process." So that is how we got to a conservative Roberts Court actually upholding immigration status for DREAMERS, which -- mind fucking blown.

Imani Gandy: But let's just talk about Sonia Sotomayor, right?

Jessica Pieklo: Oh, yes.

Imani Gandy: We just love her. So this opinion is kind of a mess. We've talked about plurality opinions before where there are different parts to an opinion, and certain justices are signing on to certain parts, and it's like if Breyer and Kagan leave St. Louis on a train moving at 75 miles an hour, and Ginsburg, and Roberts are leaving Milwaukee on a train... It's like one of those crazy math questions that you can't figure out. Everyone gets to St. Louis at 6:00 PM.

Jessica Pieklo: Is the Rule against Perpetuities implicated?

Imani Gandy: The Rule against Perpetuities. [laughter] But Sotomayor has this one part. She wrote a concurrence where she concurred and then dissented from one part, and that part was the part dealing with the challenger's equal protection claims.

Jessica Pieklo: So say more, please.

Imani Gandy: The challengers argued that the rescission violated the equal protection guarantee of the Fifth Amendment, right? The court ultimately said, "We don't think that your allegations about violating the equal protection clause are really sufficient to sustain your claims."

Jessica Pieklo: Okay.

Imani Gandy: Basically, what this means that they don't think at the very initial stages of litigation where basically almost anything goes, at the initial stages when you file a complaint, you can basically allege anything. No matter what you allege, those claims have to be taken as true. That's the way litigation works. So this idea, Sotomayor pointed out that this idea that we're going to say, "No, your claims of violations of the equal protection clause aren't sufficient," is bizarre. So the court found essentially, that the allegations were insufficient to sustain this equal protection claim. They said that in order to plead animus, that the plaintiff must raise a, "plausible inference that an invidious discriminatory purpose was a motivating factor in the decision."

Jessica Pieklo: That's a lot of law.

Imani Gandy: It's a lot of law. So invidious discriminatory purpose sounds like what it is. It sounds kind of like a Star Wars thing, right? I am Darth Invidious and I am going to discriminate against you in all of the things, so say we all. I'm just mixing metaphors, I'm mixing Battlestar Galactica and Star Wars, but you guys, bear with me. So possible evidence includes that there was a disparate impact on a particular group. So here, we kind of clearly have that.

Jessica Pieklo: I mean, you think?

Imani Gandy: There is a disparate impact that this would have on the Latino and Latina population, the Latinx population. Another thing that they would have had to allege is that the Trump administration departed from their normal procedure in going about this and that that in and of itself was evidence of an invidious purpose.

Jessica Pieklo: Uh-huh (affirmative).

Imani Gandy: You just went ahead and did shit, you didn't follow the rules and you were doing it because you were really trying to ram this discriminatory policy through.

Jessica Pieklo: Yeah.

Imani Gandy: Then that third thing is that contemporary statements by members of the decision making body raise this plausible inference of an invidious discriminatory purpose.

Jessica Pieklo: So maybe saying something like immigrants are rapists?

Imani Gandy: Hey, you would think that kind of qualifies as a contemporary statement, but here's the thing. The court said that it didn't qualify as a statement by members of the decision making body. So the members of the decision making body here are the people at DHS, Elaine Duke and then Kiersten Nielson. That decision making body does not apparently, include Trump. So Roberts basically says that all of his racist statements and he uses this word are, "un-illuminating." So the

fact that Trump said that Mexican immigrants are, "people that have lots of problems," are, "the bad ones," are, "criminals, drug dealers and rapists," apparently, those racist statements are un-illuminating when you're talking about determining whether or not there was some sort of invidious discriminatory purpose. His statements that immigrants are animals responsible for, "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking and of course, MS-13," those statements don't raise the specter of invidious discrimination because it's Trump who made them and not members of the decision making body, DHS.

Jessica Pieklo: So this sounds a lot to me like the Muslim ban case and what Roberts did in the Muslim ban case where he said, "I know that Trump said all of those terrible things about Muslims, but he said them as a candidate and not as president, so we really shouldn't pay that much attention to it." So once again, we have Chief Justice John Roberts going out of his way to excuse what is direct evidence of discriminatory racial intent. Let's be very clear; in civil rights cases, this kind of shit is gold. You rarely get this kind of direct evidence of racial discrimination and here, once again, Roberts has been like, "Meh," and Sotomayor's liberal colleagues were kind of like, "Meh," too.

Imani Gandy: Yeah, and that's really disappointing. Sotomayor has a really short and sweet opinion where she's basically like, "look, I'm not saying that there were equal protection violations here. I'm just saying that we should remand the case and allow plaintiffs to develop those claims." That's what you do in litigation. You develop claims in order to prove the allegations that you make in your complaint. Here, the court has just kneecap plaintiffs and said, "You know what? It doesn't matter if Trump called all Mexicans rapists, he's not the one making the actual decisions here," which come on, really?

Jessica Pieklo: It's absurd.

Imani Gandy: It's just absurd. The fact that Sotomayor was left twisting in the breeze by herself on that very important, critical civil rights claim and that claim that really speaks to the heart of what this case is about, which is the fact that Trump is fucking racist, man. I just find it really disheartening that Breyer and Kagan and Ginsburg couldn't sack up/ovary up and support Sotomayor in this very reasonable request that these plaintiffs simply be allowed to develop their claims that this was based on some racist ass bullshit.

Jessica Pieklo: It would be really great to see the liberal justices not make the Brown lady justice do all the racial justice work on the court.

Imani Gandy: Thank you. It's very frustrating, especially when it would have been so easy for them to sign on and just back a sister up, but no. They got her out here, just -- I need you all white folks to do better.

Jessica Pieklo: Do better, guys. Do better.

Imani Gandy: Do a little bit better, guys. So what's next, Jess?

Jessica Pieklo: Right?

Imani Gandy: We're budding up against an election. Can Trump try again? Is there room for him to try and rescind DACA, end the DACA program again before he leaves office if he ever leaves office?

Jessica Pieklo: This is a huge question. So the court said that the administration has the power to do this if they want to. They just have to do it the correct way. So really, is there a way within the APA to have folks weigh in to show that they've done the work? So that's an open question. I would not put it past the Trump administration to try. I suspect that while we've been waiting for an opinion, their minions are doing whatever their minions do in terms of cooking up memos to justify the rescission, to do all of the things that the courts in this process have said they failed to do to sort of reverse engineer that evidence. I wouldn't all be surprised to see the administration try. Will the courts hold their feet to the fire? That's a different question.

Imani Gandy: Yeah. Well, but for now-

Jessica Pieklo: Let's take the fucking win.

Imani Gandy: Let's take the goddamn win. We got a win on Monday in the title VII cases. We got to win today in DACA. Dare we hope for a win in June? Okay, I won't say it. I won't say it. I won't say it. I'm going to jinx it. I don't want to say it. We're not going to say it.

Jessica Pieklo: Put those words in your mouth.

Imani Gandy: We're going to just move on and we're going to thank some donors. We have so many new donors. We cannot even express to you how excited we are about this. It's just really overwhelming. We appreciate the support. Thank you so, so, so, so, so, so, so much. We want to thank Amanda, Gina, Dania, Kate, Sandra, Lauren, Elizabeth, Emily and Margaret. You know who you are because you donated to us. We're not going to just call you out, put your name all over Al Gore's internet, but thank you very, very, very much.

Jessica Pieklo: And Imani, we have three new monthly donors too!

Imani Gandy: What? That is so cool. I love it, love it.

Jessica Pieklo: Jessica, Meg and Zoe. Thank you all so much. This is amazing. It is just, wow. Wow.

Imani Gandy: Just, wow. Exactly. We're just wowed all over the place here. All right. So if you would like to join these fabulous people who have donated to us, if you would

like to become a monthly donor or even just a one time donor, we appreciate all of it. We need all of it if you like these reaction podcasts. If you love it when Jess takes over Rewire.News's Twitter to just do what Jess does, talk about how sexy the APA is, "Hey, baby."

Jessica Pieklo: It's sexy.

Imani Gandy: "Hey, girl. Hey, girl. Is that an APA in your pocket or are you just happy to see me?"

Jessica Pieklo: Is that a notice and comment period we got going on? [laughter]

Imani Gandy: At any rate, if you would like to join them, you can donate to [rewire.news/boomgive](https://www.rewire.news/boomgive). That's [rewire.news/boomgive](https://www.rewire.news/boomgive).

Jessica Pieklo: Or, and this still blows my mind, you can text "boomgive" to 44321. That's "boomgive" to 44321. What?

Imani Gandy: Because apparently, we live in the future, guys. It's amazing. So that's going to end it for us today. Again, it's been a great week.

Jessica Pieklo: It has been.

Imani Gandy: So takes a win. There's a lot of work to do. We're not saying there's not a lot of work to do, but take the win. Enjoy it. Have a glass of whiskey. If you don't drink, have a glass of, I don't know, sparkling blood orange soda. Just enjoy yourself. And if you would like to speak to us on Twitter about any of this stuff, you can follow me @angryblacklady. You can follow Jess at @hegemommy. You can follow Rewire.News @rewire_news. And aside from that, Jess, what are we going to do?

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

Imani Gandy: We will see you on these god's greens tubes.

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